DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-995-CFY
Status: GRANTED

Title: Michael F. Murray, Petitioner
v.
United States

Docketed:
December 17, 1986

Court: United States Court of Appeals
for the First Circuit

Vide:
86-1016

Counsel for petitioner: Randolph,A. Raymond

Counsel for respondent: Solicitor General

See also:
86-678

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1986	G	Petition for writ of certiorari filed.
3	Jan 15 1987		Order extending time to file response to petition until February 16, 1987.
4	Feb 17 1987		Brief of respondent United States in opposition filed. VIDED.
5	Feb 18 1987		DISTRIBUTED. March 6, 1987
6	Feb 27 1987	X	Reply brief of petitioner Michael F. Murray filed.
7	Mar 9 1987		The petition for writ of certiorari in No. 86-995 is granted limited to Question I presented by the petition. The petition for writ of certiorari in No. 86-1016 is granted limited to Question II presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.
			**********
9	Apr 17 1987		Order extending time to file brief of petitioner on the merits until May 23, 1987.
10	May 11 1987		Record filed.
11	May 11 1987		Certified copy of C. A. proceedings and briefs received.
12	May 15 1987		Joint appendix filed. VIDED.
13	May 23 1987		Brief of petitioners Michael F. Murray, et al. filed. VIDED.
14	May 23 1987		Brief amici curiae of ACLU, et al. filed.
15	Jun 1 1987		Record filed.
17	Jun 15 1987		Order extending time to file brief of respondent on the merits until July 27, 1987.
18	Jul 27 1987		Brief of respondent United States filed. VIDED.
19	Aug 6 1987		CIRCULATED.
20	Oct 9 1987		SET FOR ARGUMENT. Tuesday, December 8, 1987. This case is consolidated with case No. 86-1016.(1st case) (1 hr)
21	Nov 12 1987	X	Supplemental brief of respondent United States filed. VIDED.
22	Nov 24 1987	X	Reply brief of petitioner Michael F. Murray filed. VIDED.
23	Dec 8 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-995

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

RICHARD A. GARGIULO
GARGIULO & MCMENIMEN
One Court Street
Boston, MA 02108
(617) 742-3833

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

I.

When officers discover evidence during an illegal search, later obtain a valid warrant, "search" the premises again and remove what they previously found, must such evidence be suppressed, as seven other Circuits and the highest courts of at least nine states have decided, or does the inevitable discovery doctrine create an exception to the exclusionary rule in such circumstances, as the First Circuit held in this case?

II.

Whether 18 U.S.C. § 3161(h)(1)(F) and (h)(1)(J), when read together, allow a maximum of 30 days to be excluded after "the court receives all the papers it could reasonably expect" on pretrial motions decided without a hearing, as *Henderson v. United States*, 476 U.S. ___, ___, 106 S. Ct. 1871, 1876 (1986), held, or whether, regardless of how much time is actually spent on such motions, more than 30 days (here 178 days) can be excluded whenever other, possibly dispositive pretrial motions are also pending, as the court of appeals held?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

MICHAEL F. MURRAY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The original opinion of the court of appeals (App. 1a-31a, *infra*), as modified (App. 50a-51a), is reported at 771 F.2d 589. The opinion of the district court (App. 32a-48a, *infra*) is not officially reported. The opinion of the court of appeals on remand from this Court (App. 52a-61a) is reported at 803 F.2d 20.

JURISDICTION

The original judgment of the court of appeals was entered on August 26, 1985 (App. 49a *infra*). After the court of appeals denied a timely petition for rehearing (App. 50a, *infra*), Michael F. Murray filed a petition for a writ of certiorari (No. 85-1118). On May

27, 1986, this Court granted the petition, vacated the judgment and remanded the case to the court of appeals "for further consideration in light of *Henderson v. United States*, 476 U.S. ___(1986)." *Murray v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986).[1] On October 7, 1986, the court of appeals entered its judgment on remand (App. 65a, *infra*). On October 31, 1986, the court denied a timely petition for rehearing (App. 62a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sections 3161(h)(1)(F) and (J) of the Speedy Trial Act (18 U.S.C. §§ 3161(h)(1)(F), (J)) provide in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within

[1] At the same time the Court granted the certiorari petitions of petitioner's co-defendants, vacated the judgments and remanded for further consideration in light of *Henderson*. *Carter v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986); *Rooney v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986).

> which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> * * *
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * *
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> * * *
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

STATEMENT

Petitioner Michael F. Murray was named in a five-count indictment charging possession of more than one thousand pounds of marijuana with intent to distribute, and conspiracy, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), and 846. After a five-day jury trial, Murray was acquitted on two counts, convicted on

one count of conspiracy[2] and sentenced to four years' imprisonment and a $15,000 fine.[3]

Prior to trial, Murray moved to suppress evidence found in a warehouse in South Boston, Massachusetts. The suppression hearing revealed that not one, but two searches of the warehouse had occurred on April 6, 1985, the first without a warrant and the second eight hours later pursuant to a warrant.

A. THE SEARCHES OF THE WAREHOUSE

By early afternoon on Wednesday, April 6, 1983, fifteen agents of the DEA and FBI had become involved in monitoring every movement of the original defendants in this case (Pretrial Tr. 5-4). About 2:00 p.m., agents in South Boston saw a white truck and a green camper pull into a warehouse, which FBI agents had been keeping under constant surveillance

---

[2] The trial court had dismissed two counts against Murray at the close of thhe government's case.

[3] Co-defendant James Carter was also charged in all five counts of the original indictment; Murray's brother Joseph Murray was added as a defendant in all counts by a superseding indictment. Two of the conspiracy and possession counts also named Arthur Barrett, and John Rooney; two other conspiracy and possession counts also named Stephen King and Christopher Moscatiello.

Rooney and Moscatiello entered conditional guilty pleas (see Rule 11(a)(2), Fed. R. Crim. Pro.). Barrett became a fugitive before trial. The court granted Joseph Murray's motion for judgment of acquittal. After the government rested, the court dismissed one of the counts against King and the jury returned a verdict of not guilty on the remaining count against him.

After the close of the government's evidence, the court dismissed two counts against Carter. The jury convicted Carter of one conspiracy count and acquitted him of the remaining two counts.

since 1:00 p.m. (Pretrial Tr. Keaney 25, 30; 3-11–3-12, 6-28, 7-66). When the white truck and green camper left the warehouse a few minutes later, DEA agents followed both vehicles, watched a driver exchange occur as the vehicles were parked and then followed the green camper as it headed toward the Southeast Expressway and onto the Massachusetts Turnpike (Pretrial Tr. 6-7–6-14). Other agents followed the white truck as it headed into Dorchester, Massachusetts (Pretrial Tr. 5-23).

Still other agents, including the DEA agent-in-charge (Pretrial Tr. 5-3), mistakenly believed that no surveillance was being conducted of the green camper after it left the warehouse (Pretrial Tr. 5-22–5-23). As these agents pulled into a parking lot, they saw a green camper; the DEA agent-in-charge drew his revolver, arrested the occupant and looked into the camper only to find that it contained no contraband and that he had stopped the wrong vehicle and arrested the wrong person (Pretrial Tr. 5-24–5-25). At the same time, a blue van pulled into the lot and the agents placed its occupants—petitioner Michael Murray and James Carter—under arrest (Pretrial Tr. 3-26, 5-29–5-30). The agents looked through the interior of the blue van and found nothing (Pretrial Tr. 5-32). An Assistant United States Attorney was with the agents at the parking lot (Pretrial Tr. 3-30, 6-8, 6-9, 6-12). After the arrests, the DEA supervisor and other agents departed for the warehouse in South Boston (Pretrial Tr. 5-35). They were followed later by the DEA agent-in-charge, who drove Carter and Murray to this address (Pretrial Tr. 5-35).

FBI and DEA agents converged on the South Boston warehouse, which was a white, detached cinder-

block building having two large overhead doors facing the street and an entry door on the side of the building (Pretrial Tr. 3-35).[4] Without consulting the DEA agent-in-charge (Pretrial Tr. 5-36) and to the surprise of FBI agents at the scene (Pretrial Tr. 3-31), the DEA supervisor took a tire iron from his car, pried open the side door of the warehouse and entered (Pretrial Tr. Kennedy 31, 3-44). Other DEA agents followed (Pretrial Tr. 7-61).

Inside they noticed a large bay containing several vehicles (Pretrial Tr. 6-15). As the agents combed the warehouse, looking under trucks, inside vehicles and going through an office within the building, they discovered numerous bales of marijuana, red and blue notebooks, and a tape dispenser and pens used to mark the bales, all of which were in plain view and all of which were later introduced at trial (Pretrial Tr. 3-45, 6-15; Tr. 3-205, 4-25, 4-26, 4-46, 4-48).

At least ten agents went inside the warehouse after the DEA supervisor broke open the door (Pretrial Tr. 3-44). When they left the warehouse about 3 p.m., several agents were stationed outside to maintain surveillance (Pretrial Tr. 6-17). The DEA agent-in-charge took Murray and Carter to DEA headquarters (Pretrial Tr. 5-36) and, with two other agents, then went to the office of the United States Attorney (Pretrial Tr. Kennedy 34, 5-36).

---

[4] Petitioner Murray, his brother Joseph and James Carter jointly owned the warehouse. They kept personal items there, and were the only persons who had keys to the door. Petitioner worked in the warehouse daily for months after its purchase and, thereafter, for two or three days per week until April 6, 1983 (Pretrial Tr. 8-90–8-102).

Seven hours later the agents prepared an affidavit in support of a search warrant for the warehouse and had it presented to the magistrate, who issued the warrant about 10:30 p.m. (Pretrial Tr. 9-29–9-30; C.A. 46).[5] The magistrate, however, had no way of knowing that the agents had already forcibly entered the warehouse that afternoon. The affidavit nowhere mentioned the earlier search or what the agents had found (C.A. 34-43)[6]

The agents executed the search warrant at 11:00 p.m. on the evening of April 6, 1983, "seizing" the evidence they had already discovered during their warrantless entry.

B. THE OPINION OF THE DISTRICT COURT

The district court, in rejecting the petitioner's motion to suppress, thought either that the warrantless entry was not a search or that this earlier search of the warehouse could be ignored because the warrant was valid. The district court held that the search warrant was not the "fruit of an illegal search" and therefore was not "vitiated by the prior warrantless entry of the warehouse" (App. 44a). In "Supplementary Findings and Ruling on Standing," entered to "complete the record," the district court also held that no defendant had standing to challenge the searches of the warehouse (App. 47a).

---

[5] "C.A." refers to the Consolidated Appendix in the court of appeals.

[6] This decision—to avoid disclosing that the agents had already broken into the building—was admittedly intentional and deliberate and the subject of discussions among the agents during the time they were at the United States Attorney's Office (Pretrial Tr. 5-39).

C. THE ORIGINAL DECISION OF THE COURT OF APPEALS

The court of appeals held that both Michael F. Murray and co-appellant James Carter had standing to contest the searches of the warehouse (App. 22a). Indicating that there were no exigent circumstances to justify the warrantless search of the warehouse, the court passed this issue and assumed that the search violated the Fourth Amendment (App. 24a). The court then turned to the "harder question"—whether the district court should have suppressed all evidence first discovered during this illegal search (App. 27a).

Petitioner had argued that whenever an illegal warrantless search takes place, all evidence found during that search must be suppressed regardless whether there is a later search of the same premises pursuant to a valid warrant. The court of appeals recognized "that lower courts presented with the present issue have decided that evidence observed in an illegal search must be suppressed" and that "[a]rguably" the Supreme Court had agreed in *Segura v. United States*, 468 U.S. 796 (1984)(App. 28a). Nevertheless, citing *Nix v. Williams*, 467 U.S. 431 (1984), the court ruled that because "the discovery of the contraband in plain view [during the illegal search] was totally irrelevant to the later securing of a warrant and the successful search that ensued," the evidence should not be suppressed. (App. 28a).

D. THE OPINION ON THE COURT OF APPEALS ON REMAND

On petition for a writ of certiorari presenting the Fourth Amendment question and an issue under the Speedy Trial Act, this Court granted Murray's

petition, vacated the judgment and remanded the case "for further consideration in light of *Henderson v. United States*, 476 U.S. ___(1986)."[7]

On remand, the court of appeals adhered to its original decision that the Speedy Trial Act had not been violated (App. 52a-58a, *infra*). Judge Coffin dissented (App. 58a-61a, *infra*). The district court had received all necessary papers on the non-suppression motions in this case by May 27, 1983, and these motions were decided without a hearing. Although *Henderson* holds that in such circumstances only 30 more days can be excluded with respect to such pretrial motions—the time "for prompt disposition" (18 U.S.C. §§ 3161(h)(1)(F), (J))—the court of appeals determined that the 30-day period did not begin running until November 17, 1983, that is, 30 days after the district court completed hearings on the suppression motions. The non-suppression motions were decided on December 21, 1983; the suppression motions on December 23, 1983. According to the court of appeals, the non-suppression motions were not under "actual" advisement until November 17, 1983, because the district court should have decided the supposedly dispositive suppression motions by then (App. 57a-58a, *infra*). This reasoning saved the case from a violation of the Speedy Trial Act although, as the court of appeals acknowledged, *Henderson* indicates that only the 30-day period after May 27, 1983, may be excluded for such motions (App. 55a, *infra*). The court reasoned that it might not be convenient for the district court

---

[7] See *Murray v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986); *Carter v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986) and *Rooney v. United States*, ___U.S. ___, 106 S. Ct. 2241 (1986).

to decide other motions while a possibly dispositive motion was pending before it and, therefore, the non-suppression motions should not be considered under "actual" advisement until the dispositive motion is decided (or more accurately, until the time when it should have been decided).

REASONS FOR GRANTING THE WRIT

I.

This case involves an all too common pattern of law enforcement activity: first an illegal search and then, after incriminating evidence has been found, a visit to the magistrate and another "search," this time pursuant to a warrant. In refusing to suppress what the agents initially discovered in their unlawful search, the First Circuit acknowledged that other "lower courts" had reached the opposite conclusion and this Court "[a]rguably" had as well (App. 28a). But the extent of contrary judicial authority is far greater than even the opinion reveals. The First Circuit's decision conflicts with decisions of the Second, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits. It is flatly inconsistent with opinions rendered by the highest courts of at least nine states. And it is squarely at odds—not "[a]rguably" (App. 28a)—with this Court's opinion in *Segura v. United States, supra.*

Several years ago the Solicitor General urged the Court to review a case raising the same issue presented here, which had then been decided against the government.[8] The issue was doubtless important then,

[8] See the government's Petition for a Writ of Certiorari in *United States v. Griffin*, October Term 1974, No. 74-457, at pp. 2, 8.

but it has assumed far greater significance now that the First Circuit has adopted the government's position and disagreed with so many other appellate courts. Time and again those courts have determined that the result reached here would be intolerable, that it would pose a severe threat to Fourth Amendment rights, and that, rather than encouraging officers to obtain a warrant before conducting a search, it would have the opposite effect.

In this case, the court of appeals stressed that the agents' illegal discovery of evidence in the warehouse did not taint the warrant they procured hours later.[9] But the fact that the agents had independently acquired probable cause to obtain a warrant before they broke into the building and conducted a search without one relates to a different matter. Under *Segura v. United States, supra,* this removed the taint of illegality from evidence discovered for the first time during the warrant-authorized search. The independent basis for the warrant, however, has no bearing on whether the other "primary evidence," already come upon during the initial unlawful search, must be suppressed.[10]

[9] The court found, and petitioner does not dispute, that the affidavit supporting the warrant did not mention any of the evidence discovered during the illegal search of the warehouse (App. 21a).

[10] In its brief in *Segura*, the government agreed that "primary evidence"—evidence "discovered while the Fourth Amendment violation is occurring"—"ordinarily should be excluded," while "derivative evidence" later "discovered through exploitation of a prior constitutional violation" is only excludable as fruit of the poisonous tree if the "connection between the illegality and the evidence is [not] sufficiently attenuated." Brief for the United

The court below also indicated that the inevitable discovery rule, see *Nix v. Williams, supra,* could be applied to such illegally discovered evidence, apparently on the basis that since agents had probable cause it was inevitable that eventually they would comply with the Fourth Amendment.[11] The Sixth Circuit has firmly rejected the First Circuit's rationale. In *United States v. Griffin,* 502 F.2d 959 (6th Cir.), *cert. denied,* 419 U.S. 1050 (1974), which has been widely followed, agents illegally entered premises without a warrant, discovered narcotics and related paraphernalia in plain view, and four hours later obtained a warrant and seized the same items. As here, "the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the illegal entry." 502 F.2d at 960. The court of appeals nevertheless suppressed the evidence. As to the government's inevitable discovery argument, the court stated that "police who believe they have probable cause cannot enter a home without a warrant merely because they plan subsequently to get one. . . . Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." 502 F.2d at 961.

States in *Segura v. United States,* Oct. Term 1983, No. 82-5298, at p. 13.

[11] This is a prediction that will, in the future, fulfill itself if the decision below is allowed to stand. Officers within the First Circuit's jurisdiction will be able to insulate their illegality by procuring a warrant to search the same premises again and remove what they have already discovered by unlawful means. See p. 19 *infra,* noting that the "search-illegally-first-obtain-a-warrant-later" procedure had become standard police practice elsewhere.

The Eleventh Circuit, in a decision rendered after *Nix v. Williams, supra,* agrees with the Sixth Circuit. In *United States v. Satterfield,* 743 F.2d 827 (11th Cir. 1984), *cert. denied,* 471 U.S. 1117 (1986) the government contended that evidence first discovered illegally should not be excluded because it "inevitably" would have been found pursuant to the valid search warrant that issued several hours later. 743 F.2d at 845. The court held that the inevitable discovery rule of *Nix* did not apply. The rule can be invoked only if officers "possessed and were pursuing a lawful means of discovery at the time the illegality occurred." The lawful means in regard to a search is a warrant, which in *Satterfield* (as here) was neither sought nor obtained until after the illegal search. The Fourth Amendment requires that "a warrant . . . be obtained *before* the search takes place" and allowing illegally discovered evidence to be admitted on the grounds urged by the government would "practically destroy" that requirement. 743 F.2d at 846 (emphasis in original).

The decision below places the First Circuit in direct conflict not only with the Sixth and Eleventh Circuits, but also with the Second Circuit (*United States v. Segura,* 663 F.2d 411, 417 (2d Cir. 1983), *aff'd,* 468 U.S. 796 (1984); *United States v. Alvarez,* 643 F.2d 54, 64 (2d Cir.), *cert. denied,* 454 U.S. 839 (1981)); with the Fifth Circuit (*United States v. Congote,* 656 F.2d 971, 974, 976 (5th Cir. 1981); *United States v. Cherry,* 759 F.2d 1196, 1205 (5th Cir. 1985)), following *Griffin;* with the Eighth Circuit (*United States v. Williams,* 737 F.2d 735 (8th Cir. 1984); [12] with the

---

[12] After an illegal entry in violation of the Fourth Amendment

Tenth Circuit (*United States v. Owens,* 782 F.2d 146, 152-53 (10th Cir. 1986); see also *United States v. Romero,* 692 F.2d 699, 704 (10th Cir. 1982); and, by implication, with the Fourth Circuit (*United States v. Dart,* 747 F.2d 263, 270-71 (4th Cir. 1984)).[13]

In a later opinion adhering to its decision in this case, the First Circuit held that when as here the agents conduct an illegal search, observe evidence, secure the premises, then obtain a warrant and remove what they had already illegally discovered, they in effect have seized the evidence from the moment of its unlawful discovery. *United States v. Silvestri,* 787 F.2d 736, 740 (1st Cir. 1986), petition for a writ of certiorari pending, No. 86-678. While nevertheless following its decision in this case, the First Circuit again recognized that it had placed itself in conflict with other courts of appeals. The *Silvestri* court thus specifically discussed at length and rejected not only the Second Circuit's decision in *Segura,* but also the Eleventh Circuit's holding in *Satterfield,* the Fifth Circuit's ruling in *Cherry* and the Tenth Circuit's decision in *Owens.* 787 F.2d at 742-46.

The First Circuit in *Silvestri* (787 F.2d at 744) supported its decision by relying upon the Ninth Circuit's ruling in *United States v. Merriweather,* 777 F.2d 503

"one successfully could challenge the admission of only that evidence discovered as a result of the initial entry; evidence that was not discovered until after the valid search warrant was brought to the house need not be suppressed." 737 F.2d at 740.

[13] In *Dart,* the court first identified which evidence had been discovered during the unlawful search and upheld its suppression; the court only then turned to the question whether other evidence found during a later search of the premises pursuant to a warrant should be excluded. 747 F.2d at 270-71.

(9th Cir. 1985), *cert. denied,* 106 S.Ct 1497 (1986). A later Ninth Circuit decision, however, may signal a retreat from *Merriweather.* Judge Reinhardt had warned that *Merriweather* would lead to results that "will serve only to encourage illegal and unconstitutional searches." *United States v. Andrade,* 784 F.2d 1431, 1434 (9th Cir. 1986) (Reinhardt, J., "specially concurring"). Recently another panel of the Ninth Circuit heeded that warning, stating that "to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment." *United States v. Echegoyen,* 799 F.2d 1271, 1280 n. 7 (9th Cir. 1986) (dictum).[14]

When this case first reached the Court in the 1985 October Term, the government claimed that no "true" conflict existed because some of the cases were decided before *Nix v. Williams, supra,* and those courts of appeals might now reach a different decision in light of *Nix's* recognition of the inevitable discovery rule. (The government has taken the same approach in its Brief In Opposition in *Silvestri v. United States,*

[14] In *Echegoyen,*, the Ninth Circuit distinguished *Nix* on the basis that it involved two independent investigations or searches in progress, while in *Echegoyen* there was but one continuous investigation. 799 F.2d at 1280 n. 7. Contrast Brief for the United States in Opposition to Murray's Petition for Writ of Certiorari (No. 85-1118), at p. 16, arguing that *Nix* applied for the opposite reason, namely that this case "involves one continuous series of events directed at lawfully searching the warehouse pursuant to a warrant." The government's assertion is indeed remarkable. The idea that one may violate the Fourth Amendment in order to comply with it is not now and should never be part of this country's jurisprudence.

No. 86-678, at p. 7 n.5.) As the post-*Nix* decisions in *Satterfield, Cherry, Owens, Williams* and *Echegoyen* now show, there is nothing to the government's position. *Nix* did not change the law in the federal courts. It merely reaffirmed it. Prior to *Nix*, "[e]very Federal Court of Appeals having jurisdiction over criminal matters . . . endorsed the inevitable discovery doctrine." *Nix v. Williams*, 467 U.S. at 440 n.2. The courts of appeals that have decided cases in conflict with the court below before *Nix* thus did so despite their recognition of an inevitable discovery rule.[15] Cases decided after *Nix* have continued on the same and, we submit, correct course.

In the state courts, there is also a long line of cases flatly inconsistent with the decision below. The quotations in the margin show that the highest courts of Alaska,[16] California,[17]

---

[15] To say that the outcome in those cases should be different in light of *Nix* is of course to beg the question presented by this case.

[16] *Unger v. State*, 640 P.2d 151, 159 n. 9 (Alaska 1982)(dictum) ("broad application of the inevitable discovery doctrine to warrantless searches and seizures or warrantless arrests would effectively obliterate the warrant requirement of the fourth amendment.").

[17] *People v. Cook*, 148 Cal. Rptr. 605, 583 P.2d 130, 148 (1978) (*en banc*) (to admit evidence first discovered illegally and later seized pursuant to a warrant allows an officer to "conduct an unlawful confirmatory search, thus saving himself the time and trouble of obtaining and executing a warrant if he does not find the evidence. He can safely engage in this conduct because [under such a ruling] if the evidence does turn up in the course of illegal search, he will still be allowed to seize it later in a second 'search' under color of a warrant. The latter prospect thus gives him strong incentive to proceed with the warrantless entry.").

Colorado,[18] Connecticut,[19] Iowa,[20]

---

[18] *People v. Barndt*, 199 Colo. 51, 604 P.2d 1173, 1179 (1980) (*en banc*), holding that there should be "[s]uppression of the evidence found in plain view during the illegal search" and admitting (as in *Segura*) other evidence discovered during a later search pursuant to a warrant.

See also *People v. Schoondermark*, 717 P.2d 504, 506 (Colo. Ct. App. 1985).

> We conclude that the inevitable discovery rule is inapplicable to rehabilitate evidence which has been seized during a search conducted in violation of a defendant's Fourth Amendment rights. To hold otherwise would justify, if not encourage, warrantless searches. To allow admission of evidence seized in an illegal search on the theory that proper execution of a search warrant would have disclosed the seized evidence would emasculate the search warrant requirement of the Fourth Amendment and would eviscerate the exclusionary rule. It would authorize the police to circumvent the magistrate which the United States Constitution interposes, as a safeguard, between the exercise of governmental power and the rights of the citizenry. *See McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). Unconstitutional government intrusions would, as a practical matter, be beyond judicial review. *United States v. Griffin, supra.*

[19] *State v. Badgett*, 200 Conn. 412, 512 A.2d 160 (1986) (dictum) ("To qualify for admissibility the state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the constitutional violation" (emphasis in original), *citing United States v. Cherry, supra*, and *United States v. Satterfield, supra.*

[20] *State v. Williams*, 285 N.W.2d 248, 259 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980) (dictum) (to apply the inevitable discovery rule "would result in deletion of the warrant clause from the fourth amendment because that clause's sole purpose is to insert a magistrate between the proposed subject of a

Massachusetts,[21] New Jersey,[22] New York,[23] and Oregon,[24] as well as the intermediate appellate courts of Florida,[25]

search and police officers who assert probable cause for the search.").

[21] *Commonwealth v. Benoit,* 382 Mass. 210, 415 N.E.2d 818, 823 (1981) (to apply the "'inevitable discovery' rule to cure an illegal warrantless search on the basis that it was inevitable that a warrant would be obtained" "would be to read out of the Constitution the requirement that the police follow certain protective procedures—in this case, the warrant requirement of the Fourth Amendment.")

[22] *State v. Sugar,* 100 N.J. 214, 495 A.2d 90, 104 n.3 (1985) (dictum) ("when the illegality that gives rise to the claim of 'inevitable discovery' consists simply of the failure to obtain a search warrant, the exception should not be applied to circumvent the warrant requirement," citing *Commonwealth v. Benoit, supra; United States v. Griffin, supra;* and this Court's decision in *Nix v. Williams, supra.*)

[23] *People v. Knapp,* 52 N.Y.2d 689, 422 N.E.2d 531, 536 (1981) ("Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative that a warrant had been obtained. Without the deterrent effect of the exclusionary rule, in such circumstances the constitutional warrant procedure for shielding Americans from unreasonable searches and seizures would be a shambles."). Accord *People v. Arnau,* 58 N.Y.2d 27, 444 N.E.2d 13, 18 (1982).

[24] *State v. Hansen,* 295 Or. 78, 664 P.2d 1095, 1104 (1983) (*en banc*), suppressing "such items of evidence as are actually discovered by the entering officers" illegally, citing *United States v. Griffin, supra.*

[25] *State v. Ramos,* 405 So.2d 1001, 1002-03 (Fla. Dist. Ct. App. 1981):

> . . .The police cannot be permitted to search and seize persons and homes in the absence of a warrant or exigent circumstances while they seek some independent evidentiary basis to justify a search warrant. Such after-the-fact justifications are anathema to the Fourth Amendment warrant and reasonableness requirements. *United States v. Griffin, supra.* Any other ruling would, as a practical matter, permit the police to disregard the warrant requirement altogether, by illegally seizing and searching vehicles or houses, and seeking warrants only when such illegal activities produce indications or clues that contraband will be found by a more detailed search.

Idaho,[26] and Maryland[27] have rendered decisions contrary to the opinion in this case.[28] The ruling of the California Supreme Court is particularly noteworthy because, after an earlier decision appeared to adopt the same position as that of the court of appeals in this case, state officers began following what the California Supreme Court aptly described as a "search-unlawfully-first-obtain-the-warrant-later procedure."

[26] *State v. Cook,* 106 Idaho 209, 677 P.2d 522, 537, 539 (1984) (concurring opinion); *State v. Holman,* 109 Idaho 382, 707 P.2d 493, 503 (1985), rejecting application of the inevitable discovery doctrine and quoting the concurring opinion in *State v. Cook, supra:* "[t]he doctrine 'is not intended to swallow the exclusionary rule whole by substituting what the police should have done for what they really did.'"

[27] *Spiering v. State,* 58 Md. App. 1, 472 A.2d 83, 89 (1984) ("To sanction belated warrants based upon evidence independent of the initial seizure, however, would permit the police to view the warrant requirement as an *ex post facto* formality.").

[28] The Supreme Court of New Hampshire has applied the inevitable discovery rule to permit the admission of evidence discovered during an illegal search on the following basis: "although the search warrant was issued after the illegal warrantless search, the police had sought the warrant *prior to and without any reference to the illegality. . . .*" *State v. Holler,* 459 A.2d 1143, 1147 (N.H. 1983). Compare *United States v. Satterfield, supra.* The New Hampshire court cautioned that it would not allow the police to use its decision in *State v. Holler* "to justify illegal searches." 459 A.2d at 1147.

People v. Cook, supra, 148 Cal. Rptr. at ___, 583 P.2d at 146-48.[29] The California Supreme Court, sitting *en banc,* found it necessary to call a halt to this practice by overruling its prior decision and holding that evidence discovered during an unlawful search and later "seized" pursuant to a valid warrant would be excluded. *Id.*

As indicated above, the First Circuit's decision here is also flatly inconsistent with the Second Circuit's holding in *Segura,* a case the court below described as "on all fours" with this one (App. 26a). The Second Circuit in *Segura* held that evidence first discovered during an illegal search must be excluded while other evidence later discovered during an authorized search need not be suppressed. 663 F.2d 411 (2d Cir. 1981).[30] In upholding "the suppression of such evidence as was discovered upon the unlawful entry," the Second Circuit enforced the protection of the Fourth Amendment in light of "the potential for abuse" created by the sort of ruling handed down by the court of appeals in this case. 663 F.2d at 417.

When *Segura* reached this Court, the Second Circuit's determination that the initial warrantless search

[29] There are indications that this had also become "standard" procedure elsewhere (see Colorado Supreme Court Justice Erickson's concurring opinion in *People v. Barndt, supra,* 604 P.2d at 1179).

[30] In *Segura,* federal agents entered the defendant's apartment without a warrant, conducted a search, discovered a scale and other narcotics paraphernalia, and arrested a co-defendant who was in the apartment with three other people. 468 U.S. at 801. Hours later, the agents obtained a warrant and, after conducting a more thorough search of the apartment, discovered additional evidence—three pounds of cocaine, a quantity of ammunition and records of narcotics transactions. 468 U.S. at 801.

violated the Fourth Amendment was not at issue.[31] This Court therefore carefully distinguished between "primary evidence," that is, the evidence discovered during the unlawful search, and "derivative evidence" found only later. See note 10 *supra.* The question before the Court was thus whether the other "evidence subsequently obtained" through a search pursuant to a valid warrant should also be excluded as the "'fruit' of a prior illegality." 468 U.S. at 804; see also 468 U.S. at 813. On that score, the Court ruled that evidence undiscovered until the authorized search should not be excluded if the warrant is obtained without relying on what was found during the illegal search. In such circumstances the information possessed by the agents before their illegal search and on the basis of which they obtained a warrant, constituted an "independent source" for the discovery and seizure of the challenged evidence, which removed it from the "fruit of the poisonous tree" category. 468 U.S. at 813-14.

In so holding, the Court majority emphasized that "[e]vidence obtained as a direct result of an uncon-

[31] See 468 U.S. at 798, stating that the "Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to question the courts' holding that that *search* was illegal" (emphasis in original). See also 468 U.S. at 802-03 n.4, pointing out that the district court and the court of appeals held that "items discovered in plain view" during the illegal search "had to be suppressed to effect the purposes of the Fourth Amendment" and that the government had not contested this holding in the Supreme Court.

stitutional search or seizure is plainly subject to exclusion," while evidence later discovered pursuant to a warrant must be subjected to the "fruit of the poisonous tree" analysis. 468 U.S. at 804. Chief Justice Burger, writing separately for himself and Justice O'Connor, made the same point by noting that the Court's ruling would not detract from the deterrent effects of the exclusionary rule because "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." 468 U.S. at 812. There is simply no way to reconcile the decision in this case with *Segura's* reaffirmation of what has been the governing rule since *Weeks v. United States*, 232 U.S. 383 (1914). By refusing to suppress evidence that was the "direct result of an unconstitutional search"—that is, the evidence discovered during the illegal warehouse search—the court below flatly contradicted this Court's admonition in *Segura*, Chief Justice Burger's separate statement, and seventy years of Fourth Amendment jurisprudence.

Although the court of appeals invoked *Nix* to support its decision in this case and in *Silvestri*, it has not confronted the implications of its rationale under the Fourth Amendment. The fact that officers already have probable cause when they conduct an unlawful search does not render discovery of the evidence inevitable and does not justify a court's refusal to suppress it. To hold otherwise is to encourage warrantless and illegal searches. If officers find nothing on the premises during their illegal search, they have saved themselves the trouble—at the expense of the Fourth Amendment—of seeking a warrant. On the other

hand, if their illegal search uncovers evidence, as it did in this case, they may then insure admissibility by pretending they need a warrant to "search" for what they have already illegally discovered. Such a system makes a mockery of the Fourth Amendment's warrant requirement, which is why so many appellate courts are lined up firmly against the First Circuit. See generally 3 W. LaFave, *Search and Seizure*, § 11.4, at pp. 624-28 (1978), 1986 Supp. at pp. 328-31.

There is still another fundamental reason why the decision here cannot rest upon *Nix*. The evidence discovered during the warrantless search of the warehouse was not "derivative evidence"; it was primary evidence found as a direct result of the illegality. See note 10 *supra*. Yet *Nix* dealt only with derivative evidence, stemming from a Sixth Amendment violation, which inevitably would have been discovered by lawful means.[32] This is why Chief Justice Burger in *Segura* could reaffirm for the Court—without mentioning his earlier opinion in *Nix*—that evidence discovered as a "direct result" of an unconstitutional search in violation of the Fourth Amendment must be suppressed.

The conflict between the federal courts of appeals (and between the First Circuit and the state courts) on this recurring and important issue cannot be denied. The case thus clearly warrants review by this Court.[33]

---

[32] This Court had ruled that the direct product of the Sixth Amendment violation in *Nix v. Williams*—incriminating statements of the defendant—must be suppressed. *Brewer v. Williams*, 430 U.S. 387 (1977).

[33] James D. Carter, the only other defendant who has standing

II.

The Speedy Trial Act issue decided by the court of appeals on remand will occur in every criminal case in which defendants file possibly dispositive motions such as motions to suppress evidence, motions to suppress confessions, motions to dismiss the indictment, and so forth. Since such motions are routinely in criminal cases, the situation represented by the present case constitutes the norm, rather than the exception. In the court below, the government agreed that the Speedy Trial Act issue in this case "is one of extraordinary significance in terms of trial practice and management of the dockets of the District Courts."

The court of appeals itself acknowledged that a literal reading of *Henderson* results in a determination that the Speedy Trial Act was violated in this case (App. 55a). Under *Henderson*, after all necessary papers have been received on pretrial motions without a hearing, the motions must be disposed of in 30 days. The court of appeals, however, devised a new rule, suspending the 30-day period from running whenever another motion, to be decided after a hearing, is pending and might moot the non-hearing pretrial motions. This, we submit, is nothing more than a rule of convenience for district courts, a rule that conflicts with *Henderson*, which holds that the 30-day period begins not when the trial court finds it appropriate but when it has received all the papers needed to decide such routine pretrial motions without a hearing. On all of this, petitioner relies on the petition for a writ of

---

to contest the search of the warehouse, relies on this certiorari petition. See *Carter v. United States*, No. 86-___ (Petition for Writ of Certiorari).

certiorari of co-appellant James D. Carter (*Carter v. United States*, No. 86-___, Oct. Term 1986), which presents the same question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
RANDOLPH & TRUITT
1752 N Street, N.W.
Suite 801
Washington, D.C. 20036
(202) 785-3100

RICHARD A. GARGIULO
GARGIULO & MCMENIMEN
One Court Street
Boston, MA 92108
(617) 742-3822

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER MOSCATIELLO,

Defendant, *Appellant.*

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. ROONEY,

Defendant, *Appellant,*

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. CARTER,

Defendant, *Appellant.*

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL F. MURRAY,

Defendant, *Appellant,*

Nos. 84-1192, 84-1193, 84-1262 and 84-1263.
Argued Oct. 5, 1984.
Decided Aug. 26, 1985

Defendants were convicted in the United States District Court for the District of Massachusetts, Walter Jay Skinner, J., on charges arising out of a conspiracy to possess and distribute illegal drugs, and they appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) warrantless search of camper and truck was valid, and (2) even assuming warrantless entry into warehouse, violated Fourth Amendment, evidence uncovered as result of subsequent search of warehouse pursuant to valid warrant was not subject to suppression since the evidence was discovered through an untainted source and would have been discovered even if the illegality had not occurred; furthermore, valid entry provided independent justification for seizure of marijuana bales which were in plain view at time of the illegal entry and remained in plain view at time of the search pursuant to the warrant.

Affirmed.

Daniel J. O'Connell, Boston, Mass., with whom Eileen D. Vodoklys, Framingham, Mass., was on brief for defendant, appellant Christopher Moscatiello.

Martin G. Weinberg, Boston, Mass., with whom Kimberly Homan and Oteri, Weinberg & Lawson, Boston, Mass., were on brief for defendant, appellant John M. Rooney.

Marshall D. Stein, Boston, Mass., with whom Cherwin & Glickman, Brian J. McMenimen and Gargiulo & McMenimen, Boston, Mass., were on brief for defendant, appellant James D. Carter.

A. Raymond Randolph, Washington, D.C., with whom Christopher L. Varner, Washington, D.C., was on brief for defendant, appellant Michael F. Murray.

Gary C. Crossen, Asst. U.S. Atty., Boston, Mass., with whom William F. Weld, U.S. Atty., Boston, Mass., was on brief for appellee.

Before CAMPBELL, Chief Judge, BREYER, Circuit Judge, and WEIGEL,* Senior District Judge.

LEVIN H. CAMPBELL, Chief Judge.

Defendants appeal from criminal convictions on drug charges.

During the first part of 1983, federal agents received information implicating defendants-appellants John M. Rooney, Christopher Moscatiello, James D. Carter, and Michael F. Murray, as well as Arthur Barrett and Stephen King, in a conspiracy to possess and distribute illegal drugs. That information was corroborated by information received from law enforcement officials in the Boston area and by spot surveillance conducted by federal agents from the summer of 1982 to April 1983. On April 6, 1983 agents concluded from the pattern of vehicular activity that defendants were observed to engage in that a sale of drugs was imminent. Accordingly, they arrested them on the afternoon of April 6 and conducted searches of a green Dodge camper, a white Ford truck, a garage at 15 Sylvester Road, Dorchester, Massachusetts, and a warehouse at 345 D Street, South Boston, Massachusetts. All four searches uncovered large amounts of baled marijuana.

Moscatiello, Rooney, Carter, Murray, and Barrett were charged two weeks later in a five-count indictment for various drug violations. Courts I and III charged Murray, Carter, Rooney, and Barrett with possessing and conspiring to possess more than one thousand pounds of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), 846. Counts II and IV charged Murray, Carter, King, and Moscatiello with separate counts of possession and conspiracy in violation of the same provisions of the United States Code. Murray and Carter were charged in Count V with yet another count of conspiracy in violation of 21 U.S.C. § 846. In a superseding indictment, Murray's brother Joseph was added to all five counts.

Appellants moved to suppress the evidence seized in the vehicular and building searches. These motions were denied in a memorandum dated December 23, 1983. Trial was set for January 23, 1984. On that date appellants joined in a motion to dismiss for violation of the Speedy Trial Act. The court, after a preliminary review of the motion and with acquiescence of counsel, reserved its ruling and directed the parties to proceed to trial; the court denied the motion on February 10, 1984. On January 23, Rooney and Moscatiello entered conditional pleas of guilty to count IV, reserving their objections to the court's rulings on the two motions. The other two appellants, Murray and Carter, were found guilty of counts I and II, respectively, after a jury trial.

All four appellants appeal from the district court's denial of their motion to dismiss for violation of the Speedy Trial Act, as well as from the court's refusal to suppress the seized evidence. We affirm.

I. THE SPEEDY TRIAL ACT

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, provides that the trials of defendants who plead not guilty shall commence within 70 days of their indictment. 18 U.S.C. § 3161(c). In computing the seventy-day period, the Act provides for certain exclusions as follows:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(f) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161.

Defendants were indicted on April 20, 1983. Trial began on January 23, 1984, some 278 days later. The parties are in agreement that 173 of those days are clearly excludable, leaving an excess of 35 days over the permitted 70.

The period whose excludability remains in controversy runs from October 17 to December 23, 1983. On October 17, the district court completed hearings on the several motions to suppress filed by the defendants on May 9 and took them under advisement. The court decided these motions on December 23, 1983. Also pending before the court on October 17 were motions for severance, for orders *in limine*, for election of counts, and for controlling the sequence of the government's presentation of evidence, all of which were also filed on May 9; no hearing was held on these latter motions, which were not decided until on or after December 23, 1983.

Pursuant to 18 U.S.C. § 3161(h)(1)(J), the district court excluded the 30 days between October 17 and November 16 as time during which, the motions to suppress "were actually under advisement by the court." Appellants object on the ground that the court made no showing that it was actually considering the motions on every one of the excluded 30 days.

Arguing that such a showing is necessary for an exclusion under § 3161(h)(1)(J), appellants direct our attention to the report of the Senate Judiciary Committee, accompanying the Senate version of the Speedy Trial Act of 1974. The Committee amended the bill to exclude time "reasonably attributable to delays during which a matter is actually under advisement," S. Rep. No. 1021, 93d Cong., 2d Sess. (1974), *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 104 (1980), in response to a suggestion by the Justice Department that the committee resolve an ambiguity in the bill's original language as to the time covered by the exclusion for a "proceeding concerning the defendant." The Committee report cautioned that the Committee did not intend

> "in adopting this amendment to give a blanket exception to matters under advisement[,] for the time excluded must be reasonably attributable' and the matter must be 'actually under advisement.' Therefore, the judge must be actually considering the question, for example, conducting the research on a novel legal question."

Id.

Appellants would have us conclude from this that, absent precise judicial findings showing that the court had actually spent each of the days sought to be excluded working on a motion, the exclusion is not allowable.

Like the Eleventh Circuit, we are not persuaded by this argument. *See United States v. Mers*, 701 F.2d 1321, 1338-39 (11th Cir.) *cert. denied.*, ___ U.S. ___, 104 S.Ct. 481, 78 L.Ed.2d. 679 (1983). The "actually under advisement" language in the statute, and the phraseology of the Committee report, do not specify that, in addition to having a matter under advisement, the court must demonstrate that it was working on it each of the days sought to be excluded. Such a requirement would be unprecedented and impracticable. It is, moreover, belied by other parts of the legislative history. The language of the Senate bill was amended before passage by the House of Representatives, which added the phase, "not to exceed thirty days" to § 3161(h)(1)(J). According to the report prepared by the House Committee on the Judiciary, [t]he amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:

> N w, I think the language which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term, term "reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted on the matter under advisement is not an unreasonable period in which the district judge could act, I do not think that this would compel the judge to reach on any particular issue an improvident answer merely because he is held to a time limit of 30 days. And yet, if such a provision or restriction were written into the Act, it would ef-

fectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well "sit on a mater" for an indefinite period of time and thus rather effectively defeat the purposes of the bill.

The Committee concurs with the views of Mr. Barris and also with the Alaska speedy trial rules of court, which provide that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

H. Rep. No. 1508, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 7401, 7425-26.

Two conclusions emerge from a reading of this part of the report. First, the House Committee understood the Senate bill to permit a judge to "sit on" a proceeding indefinitely, an interpretation incompatible with an understanding of the "actually under advisement" language that would only allow the exclusion of time actually spent on research, writing, or reflection. Second, the committee contrasted delays of less than 30 days under the present § 3161(h)(1)(J) with further delays excludable only under the continuance provision of § 3161(h)(8); in the latter case, the committee notes, "the court must set forth with particularity reasons for granting such a motion." We infer that no elaboration of findings or of reasons was thought to be required for § 3161(h)(1)(J) exclusions, which were automatically limited by the 30 day period.

We accordingly hold that the full 30 days between October 17 and November 16 during which the suppression motions were under advisement is excludable under § 3161(h)(1)(J). This still leaves the total of nonexcluded days

at 75, or 5 over the statutory limit. The district court explained its exclusion of the remaining time until the suppression motions were decided on December 23, 1983, as follows:

> The defendants had also filed a large number of other motions, for severance, for orders *in limine*, election of counts, and for controlling the sequence of the government's presentation of evidence. These motions were pending during consideration of the motions to suppress evidence.
>
> No hearing was held before me on these matters. I did not consider them or take them under advisement until after I had decided the motion to suppress on December 23, 1983. They are therefore not subject to the thirty day provision of § 3161(h)(1)(J) but to the reasonable time requirement implicit in § 3161(h)(1)(F). . . .
>
> These motions primarily concerned the ordering of the trial. The summary judgment [sic] motion, however, was dispositive. If it had been allowed, the government would not have been able to go forward with trial. I conclude that it was reasonable to hold these motions until I had decided the motion to suppress.
>
> Even though the motion to suppress was under advisement for longer than the permitted *excludable* time of thirty days, it was not held an unreasonable time in my view given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment, albeit expert, should support a finding of probable cause. While the Speedy Trial Act is intended to discourage obsessional delay, it should not be interpreted to discourage thoughtful consideration by the district judges of difficult questions.

We agree that the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under § 3161(h)(1)(F). It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions. These remaining motions, as Judge Skinner stated, "primarily

concerned the ordering of the trial." Had the suppression motions been sustained, the prosecution might not have had sufficient evidence to go forward, rendering the procedural motions moot. And while the time spend deciding the suppression motions was greater than the 30 days for which credit is automatically allowed under § 3161(h)(1)(J), it was not unreasonable, in light of their multiplicity and obvious complexity (as reflected, infra, in the present opinion.)

This case is on all fours with our recently decided case of *United States v. Anello*, 765 F.2d 253, 256-258 (1st Cir. 1985), where we excluded time in excess of 30 days reasonably spent in deciding multiple suppression motions that as a practical matter had to be decided prior to other pending motions. Following *Anello*, we affirm the district court's exclusion of such time here.

We conclude that the total nonexcludable time amounted to 45 days, and that the Speedy Trial Act was not violated.

II. SEARCH AND SEIZURE ISSUES

Critical to the resolution of this appeal is a determination of whether there was probable cause to seize or search without warrant the two vehicles at issue—a green camper and a white truck, and by extension, whether there was probable cause to issue search warrants for two buildings—a garage and a warehouse. First, we will set forth a brief summary of the key events of April 6, 1983, the day the contested searches and seizures took place, based on fact findings of the district court.

At approximately 2:25 p.m., federal agents stopped a green Dodge camper driven by Moscatiello and a red Cherokee jeep driven by King at the Allston Toll Plaza on the Massachusetts Turnpike. Both defendants were placed under arrest. Upon entering the cab of the camper to move it to the roadside, DEA Special Agent Powers observed through a rear window of the cab that the camper area contained burlap-covered bales, which he knew to be a common packing for marijuana. Powers immediately broadcast to the other agents his observation of the bales. The camper was then impounded, a search warrant was eventually obtained, and a search of the bales pursuant to this warrant disclosed that they indeed contained marijuana.

At 2:30 p.m., Rooney, who had been followed from the Northern Avenue area, drove a white Ford truck into the driveway of a garage. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he noticed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's hands at the time of his arrest and DEA Special Agent Boeri used one of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. After the agents seized the car, the bales were examined some 18 hours later, without obtaining a warrant in the interim.

Based on the discovery of marijuana in the green camper and white truck, federal agents later obtained a warrant to search the garage at 15 Sylvester Road.

During the course of the April 6 surveillance, federal agents observed the white truck and green camper enter the cinder block warehouse at 345 D Street, then exit some 20 minutes later. Agents at that time also observed two men inside the building. After seizing the truck and camper, as well as the blue van shortly after the seizure of the camper, and after arresting the occupants of those vehicles, Carter, Murray, Rooney, and Moscatiello, agents converged on the warehouse. There they observed a short white male, approximately 45 years old, pacing back and forth on D Street in front of the white cinderblock building, looking at traffic as it passed. After agents drove around the block, the man was no longer seen outside the building.

At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building to look through

a window but could not see the general interior of the building. At all stages of this process, the agents regularly stated their identities as federal law enforcement agents. Finally, the agents made a forced entry of the building. After a brief view of the premises, they determined that no one was inside, detected a strong odor of marijuana, and observed many burlap-wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside.

A search warrant for the warehouse was executed at 11:00 p.m. that evening. In their application to the magistrate for the warrant, the agents disclosed and relied *inter alia* on their search of the truck and their seizure of the camper, but neither disclosed their forced entry into the warehouse nor made use of the fruits of that entry. The later search of the warehouse pursuant to the warrant uncovered in addition to the marijuana, a red and a blue spiral notebook, tape dispensers, marking pens, and marked pieces of tape that had been affixed to the bales of marijuana.

A. VEHICLE SEARCHES

Appellants Moscatiello and Rooney contend that both the warrantless stop and seizure of the green camper and the stop and search of the white truck violated the fourth amendment, and that therefore the bales of marijuana found in those vehicles should have been suppressed as tainted fruits of those searches. We find no merit in this contention. We agree with the court below that when the agents stopped and entered the green camper, they had probable cause to believe that contraband was being transported in it and were therefore empowered both to stop and search it under the so-called automobile exception to the warrant requirement under the fourth amendment.[1]

[1]In his brief, Moscatiello argues from the district court's consistent reference to the "search" of the White Ford truck and the "seizure" of the green Dodge camper that the court rejected the government's assertion that it had probable cause to *search* the camper before federal agents seized it at the toll plaza. We find no merit in the contention.

See, e.g., United States v. Ross, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Armed with the additional evidence of marijuana in the green camper, the agents had ample probable cause to search the white truck as well.

In viewing the district court's determination of probable cause, we of course look at the facts in the light most favorable to the court's ruling and accept the court's findings unless they are clearly erroneous. *See United States v. Patterson*, 644 F.2d 890, 894 (1st Cir. 1981); *United States v. Jobin*, 535 F.2d 154 (1st Cir. 1976); 3 C. Wright, Federal Practice and Procedure § 678, at 805 & n. 24 (2d ed. 1982) (citing cases). To find probable cause, a court can rely on an "assessment of probabilities in particular factual contexts" that criminal activity may be taking place. *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). Here the district court relied on the totality of the circumstances—reliable informant information linking the various codefendants to an ongoing drug ring, coupled with detailed surveillance observations of suspicious vehicular activity—to establish probable cause. While the district judge noted that neither class of evi-

The court doubtless distinguished the "search" of the white Ford truck from the camper because the former was searched immediately while the latter was obtained. But there is no reason to distinguish the facts which would provide probable cause to seize the vehicle from those which would provide probable cause to search it: for both purposes it was necessary to find that it was likely being used to transport illegal drugs.

Moscatiello also reads the court's conclusion that it was "persuaded that the officers were justified in arresting the defendants, searching the white Ford truck and seizing the green Dodge camper" as equating the question whether there was probable cause to seize the camper with whether there was probable cause to arrest Moscatiello. Moscatiello then tries to show that the agents lacked probable cause to arrest him. We see no reason to consider the arrest question. As there was probable cause to have seized and searched the vehicle in which he was riding, the court had ample basis for refusing to suppress the contraband which was discovered in the camper.

dence would have sufficed by itself, put together they made a strong case for finding probable cause.

The informant evidence came from three separate sources. Informant Glen Castro described his own personal involvement in conversations and drug interactions with Rooney and Barrett during the first part of 1982. These included Rooney's delivery to Castro of a bale of marijuana a conversation with Barrett where Barrett described the counting of $1 million in drug money, a conversation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view), and generally, the joint involvement of Rooney, Barrett, and others in drug traffic.

A second informant, who had provided reliable information to the FBI in the past, told an agent that Barrett was selling marijuana and cocaine out of his home in April, 1982 and had a large supply of both drugs in his living-room.

A third informant described conversations between Barrett and Joseph Murray in March, 1983 about an incoming marijuana shipment, and averred in a general way that Barrett was part of the "Joe Murray crew", a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Rooney contests the reliability of the information the government gained from its informants. Rooney notes that the information provided by two of the informants concerned defendants' activities in April, 1982, a year before their arrests. One of the two, Glen Castro, was serving time for bank robbery when he provided the information. The third informant's information concerned events in February and March of 1983, but the government had no

independent confirmation of his reliability, and much of his information was single or multiple hearsay.

These objections are not persuasive. Although a convicted felon, Castro gave very detailed information, asserted to be from first-hand, the tenor of which was substantially corroborated by the two others. The second informant, who corroborated Castro's information as to Barrett, had a track record of reliability. Although both his and Castro's information concerned events in April, 1982, the association of Barrett and Rooney with Barton, who was arrested on an unrelated drug charge but later released, was confirmed by surveillance within a matter of months. While the third informant's information was mostly hearsay, it was not entirely so and was in some respects corroborated by the results of surveillance.

To be sure, the informants' evidence related to drug dealings sometime before the challenged searches. But it was verified and, as it were, updated by the surveillance evidence, which indicated that, right up to their arrests, Rooney and Barrett were up to their old tricks.

And the kind of criminal conduct related by the informers was not the kind which became stale overnight. As one court has stated,

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andersen v. State, 24 Md.App. 128, 331 A.2d 78 (1975), *aff'd*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

The informant evidence in the present case is far more like a tortoise than a hare. A drug enterprise involving a network of suppliers, distributors, and customers is not created and then willingly dismantled the next day. Assuming, as the informants said, that defendants were operating out of a garage in South Boston, and were dealing extensively in marijuana, a valuable and bulky commodity, early in 1982, it would be reasonable to assume they were still doing the same a year later.

Verification through surveillance began as early as July or August of 1982. The informants' information as to the regular association of Rooney and Barrett was confirmed, as was their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays were observed in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received from state and local officials in March, 1983 indicated that there was a warehouse somewhere in South Boston which was used to store marijuana, though several possible locations for the warehouse furnished by the officials proved to be inaccurate.

On April 5 and 6, 1983, the agents observed defendants to be engaged in a complex pattern of vehicular activity which included trips by the white Ford truck, the green camper and the blue van to a garage and into a warehouse under circumstances suggesting that they were being loaded there, followed by trips under close escort of other vehicles to possible distribution points. The district court made detailed findings about these actions which we need not repeat here. It is enough to say that defendants met with one another, on occasion exchanged vehicles and keys, and drove about in various combinations of vehicles. For example, the white Ford truck was observed to back up to a garage at 15 Sylvester Road, where objects were placed on either side of it, obstructing the view into the garage. When the truck left the garage it was closely

followed by Barrett in an automobile, and when the truck stopped at Santoro's subshop, Barrett passed, did a U-turn, and parked by its side. A similar pattern consistent with the transport and delivery of some highly valued substance occurred with respect to the blue van and, later, the white Ford truck and green camper, this time at a cinder block building, the doors of which were opened to admit the vehicles by persons inside, and then closed. A tractor trailer rig was observed inside with a large dark colored contained on top. Certain agents who testified at the trial opined, in light of specialized knowledge of drug trafficking, that certain of the observed practices, e.g., the following of the trucks by an escort car at such a close distance as to prevent the intervention of another vehicle, were typical of drug operations. Nothing suggested that defendants were engaged in an ascertainable legitimate business.

In the context, in which it arose, the surveillance evidence provided convincing indicia of drug trafficking. Given the informants' evidence that Barrett, Rooney and the Murrays had been dealing in marijuana and cocaine on a systematic basis, it provided powerful reason to believe that all defendants were doing precisely what, in fact, they were doing. Even an unsophisticated observer lacking the prior information would have suspected the actions of men rushing about in a mini-fleet of vehicles between a garage and warehouse in the manner described. Sophisticated observers, such as drug agents, were entitled to draw even more precise inferences, as "[c]onduct innocent in the eye of the untrained may carry entirely different messages to the experienced or trained observer." *United States v. Woolery*, 670 F.2d 513, 515 (5th Cir.) (quoting *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977), *cert. denied*, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *accord United States v. Manchester*, 711 F.2d 458, 461 (1st Cir. 1983).

Rooney and Moscatiello question the basis for Agent Keaney's testimony that the traffic was of a kind frequently employed during the transportation of drugs. Mos-

catiello argues that no foundation was laid for Keaney's testimony to that effect; however, Moscatiello's brief itself cites to Keaney's testimony that he had conducted "numerous" vehicle surveillance, during several of which "multiple vehicles [were] used . . . for counter-surveillance [or] for security." Rooney suggests that the proper universe of experience is not all drug trafficking, in which the use of multiple vehicles for surveillance or security might indeed be common, but drug trafficking in the Northeast, where, to Keaney's own knowledge, no drug hijackings had occurred. But the fact that Keaney knew of no hijackings in the Northeast does not imply that he could not infer that the second vehicles were serving a security or counter-surveillance function; whether or not hijackings were common, defendants might still regard the risk as worth protecting against, and it is hard to think of any innocent activity which would have induced each precautions.

Rooney argues that the vehicles used by defendants were occasionally seen traveling alone. We do not find these observations inconsistent with Keaney's theory, which only demands that vehicles travel in groups when actually transporting marijuana.

Rooney also makes other arguments, none of which we find convincing. We add that while the driving of vehicles in tandom undoubtedly strengthened the inference of drug smuggling, it was by no means the only basis for such an inference. The shuttling of vehicles back and forth from the garage and the cinder block warehouse, the entire modus operandi of a group at whose center were men who were known drug smugglers, could reasonably be explained only as the agents in fact did explain these actions.

Rooney contends that the government lacked probable cause, on the authority of *United States v. Freitas*, 716 F.2d 1216 (9th Cir. 1983), a case also involving multiple informants and corroborative surveillance. While the facts found insufficient to support a determination of probable cause in *Freitas* bear some resemblance to those in the

present case, the quality of the informants' tips in *Freitas* was significantly inferior to that of Castro's in that neither of the *Freitas* informants' tips disclosed the basis for its information; Castro, on the other hand, indicated that he himself had received drugs from Rooney. Since the court in *Freitas* noted that if an "informant [speaks] with personal knowledge, then the information is usually deemed reliable enough to support a finding of probable cause," *id.* at 1221, it seems likely that the *Freitas* court, which found the probable cause determination a "borderline" one, *id.* at 1224, would regard the fact that Castro indicated that he spoke from personal knowledge sufficient to tip the scales in the present case the other way. In any event, we are not necessarily bound by the views of the *Freitas* panel.

We conclude that there was ample probable cause for the stop and seizure of the green camper. It follows then that the same facts, with the addition of the sighting of the bales in the green camper, also furnished probable cause to search the white truck. The main argument which Rooney offers to distinguish the search of the white truck is that the vehicle was parked on private property at the time it was subject to a warrantless search. We find, however, that the fact of being parked on private property did not suffer to exempt the vehicle from being searched where probable cause otherwise existed.

Rooney finds some support for his position in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In that case, defendant was arrested inside his home on murder charges, and his cars, which were parked on his driveway, were towed to the police station to be searched. In an opinion attracting only four votes, Justice Stewart held that the search of the impounded car fell outside the automobile exception to the warrant requirement because, *inter alia*, the need to search the car did not arise suddenly at the time of Coolidge's arrest, objects sought were not contraband, the cars were unoccupied and on private property, and Coolidge could not have gained access to the vehicles to destroy evidence.

However, our case is clearly distinguishable. In sharp contrast to the facts in Coolidge, here the agents who arrested Rooney searched the truck immediately after pursuing the defendant to the garage site on the reasonable belief that it contained contraband. Moreover, Coolidge's car had been parked in the driveway of his own home while Rooney was temporarily parked on property, which albeit private, was not *his* property; therefore, he cannot derive any greater expectation of privacy from that fact than if the vehicle had been parked in a public place. Although Rooney attempts to draw a bright line between vehicles on private property and those on public property, thee is a clear distinction between a search of a car that the police had pursued onto private property and one that was long unoccupied and parked in a driveway for a period of time.

As the opinion in *California v. Carney*, ___ U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), which extends the automobile exception to mobile homes, makes clear, the inherent mobility and pervasive regulation of vehicles form the bases for a reduced expectation of privacy. *Carney*, rather than supporting the public/private distinction advocated by Rooney, merely confirms the special fourth amendment treatment accorded the search of vehicles.

Finally, although it is perhaps true that the FBI agents who arrested Rooney could have blocked off the driveway and immobilized the white truck, and so one of the reasons given in *Coolidge* for not permitting a warrantless search would apply here, the continued vitality of that particular reasoning is doubtful. That section of the *Coolidge* opinion commanded only four votes. Moreover, the Court in *Ross*, in explaining how the rationale for allowing the warrantless *seizure* of an automobile—that it might be driven away before a warrant could be obtained extended to the *search* of the interior of its seats—found that the minimal increase in intrusiveness inflicted by searching a car immediately instead of impounding it and seeking a warrant simply was not of constitutional significance. *Ross*, 456 U.S. at 807 n. 9, 102 S.Ct. at 2163 n. 9.

We hold, therefore, that probable cause to believe that Rooney was using the white truck to transport contraband sufficed to support the seizure and search of the truck. Moreover, under *Ross*, a search of the entire vehicle, including, the examination of any closed container that may conceal the object of the search is permissible. *Ross*, 456 U.S. at 825, 102 S.Ct. at 2173. The fact that the bales found in the white truck were not examined until 18 hours later does not render the search illegal in light of the recent Supreme Court decision, *United States v. Johns*, _ U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), holding that a delay of three days before searching containers from impounded trucks was reasonable. *See United States v. McHugh*, 769 F.2d 860 (1st Cir. 1985) (a search of bales of marijuana seven days after the seizure of the truck in which they were contained is permissible). We conclude that no violation of the fourth amendment was committed in the warrantless search and seizure of the white truck.

B. SEARCH WARRANTS

Given the combination of the informant information and corroborated surveillance and since we hold the probable cause existed to search the white truck parked in the driveway of the garage, we also hold that there was ample probable cause to support the issuance of the warrant to search the garage itself and that the search pursuant to the warrant was permissible.

The issue of the validity of the search warrant for the warehouse, however, merits more discussion. In its Memorandum and Order on Various Motions of the Defendants to Suppress and to Dismiss, the district court held that none of the defendants had standing to contest the legality of the search of the warehouse. The court also ruled that the warrant to search the warehouse was legal since it rested on a showing of probable cause that was independent of and untainted by the prior illegal entry, noting that the omission of any references to the earlier search in the affidavits did not affect the magistrate's decision by enhancing the affidavits' content. The court admitted not only the evidence discovered for the first time *after*

issuance of the warrant but also evidence of the bales which were in plain view when the agents made their initial warrantless entry of the warehouse and, of course, remained there until a full search took place pursuant to the warrant that had been subsequently obtained.

Murray and Carter urge us to suppress all evidence seized in the warehouse as the product of an illegal search. They argued that they both had a reasonable expectation of privacy in the warehouse, and that therefore the trial court erred in holding that they lacked standing to contest the legality of the searches. They further assert that the search warrant for the warehouse was tainted by the agents' failure to mention the earlier warrantless search of the warehouse, requiring the suppression of all evidence seized at the warehouse; in the alternative, they argue that any evidence observed in plain view during the initial unauthorized entry, i.e., the bales wrapped in burlap, must be suppressed as the direct product of a fourth amendment violation even if the later search made pursuant to the warrant was untainted. The government contests each of these arguments, and in addition replies that exigent circumstances justified the entry into the warehouse without a warrant.

1. Standing

We believe the court erred in ruling that "[n]one of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation, in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer." The lower court's reasoning seems to have been that the fourth amendment affords a defendant no protection unless he either owned the warehouse personally or used some portion of it for his personal use. But there was ample evidence to indicate that Murray and Carter had "a legitimate expectation of privacy in the area searched." *E.g., United States v. Salvucci*, 448 U.S. 83, 92, 100 S.Ct. 2547, 2553, 65 L.Ed.2d 619 (1980).

In *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), state officials, acting without a warrant, searched the union office shared by DePorte, a union official, and several other union officials. The Court rejected arguments that DeForte lacked standing to object to the admission of papers seized during the search because the place searched was not his home, or because he had no proprietary interest in his office, or because he shared the office with other officials. The court, per Justice Harlan, concluded that DeForte "could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." *Id.* at 369, 88 S.Ct. at 2124.

In the present case, Murray testified that he, Murray's brother, and defendant Carter each put up $20,000 to acquire the warehouse and that the three of them, along with one William Rae, held the stock of Harbor Oil, Incorporated, the corporation that held title to the warehouse, although only the Murrays' names appear on the mortgage used to finance the rest of the warehouse's purchase price. Thus, Murray and Carter, unlike DeForte, had, through their close corporation, a proprietary interest in the searched premises.

More importantly, only the Murrays and Carter had keys to the warehouse, and they testified that the warehouse was kept locked, as agents found it prior to the warrantless search; the number of persons afforded access to the warehouse would seem considerably smaller then the number of officemates, union superiors, and invitees that had access to DeForte's office. Murray and Carter also kept personal property in the warehouse, including a jacket found by the agents with $1,000 in the pocket (not to mention the large quantity of marijuana), further indicating an expectation of privacy. We therefore hold that Carter and Murray had standing to contest the search of the warehouse.

2. Exigent Circumstances

The government replies that even if Carter and Murray have standing to contest the initial entry of the warehouse, exigent circumstances made the warrantless search and seizure legal; specifically, that, had the agents not entered when they did, they would have run a significant risk that evidence would have been destroyed before a search pursuant to a warrant could have been effected. We held in *Archibald v. Mosel*, 677 F.2d (1st Cir. 1982), that law enforcement officials may conduct a warrantless search that would otherwise be illegal if they have a reasonable perception that exigent circumstances obtain. It is difficult, however, for us to deal with this issue on the record and findings as they presently stand. The district court made no findings on the question of exigency, and while we do not rule out all possibility that the risk of destruction of evidence inside the warehouse was so great as to allow a warrantless entry, the government's position is uphill and, absent findings by the lower court, we are loath to conclude that exigent circumstances existed as now argued. We accordingly do not reach the government's claim of exigency but turn directly, as did the district court, to the question of whether or not to suppress the evidence found in the warehouse on the assumption, *arguendo*, that the warrantless entry was in violation of the fourth amendment.

3. The Exclusionary Rule

Even assuming that the original, warrantless, entry into the warehouse was illegal, we are not required to invoke the exclusionary rule. Since *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920), the Supreme Court has recognized that evidence obtained through an independent, lawful source need not be suppressed even if the police were also led to it through means that violated the fourth amendment or some other constitutional guarantee. The theory behind this rule is clear, where the evidence was discovered through an untainted source and would have been discovered even if the illegality had not occurred, the evidence is not a fruit of the illegality. *Cf. United States v. Leon*, ___U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

In *Segura v. United States*, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), the Court was faced with a sequence of an illegal entry followed by a legal one strikingly similar to the present one. In *Segura*, New york Drug Enforcement Task Force officers investigating a cocaine ring stopped two of the suspects and found them to be carrying cocaine. Agents were then authorized to arrest petitioners Segura and Colon and secure Segura's apartment to prevent the destruction of evidence, even though, they were told, a search warrant probably could not be obtained until the next day. At 7:30 that evening, agents established external surveillance of Segura's apartment. At 11:15, Segura entered the lobby of the building. Agents then took him to his apartment and knocked at the door. When a woman later identified as Colon answered the door, agents entered the apartment without requesting or receiving permission, and without having obtained a warrant. Agents conducted a security check of the premises, observing in the process several items of drug paraphernalia; none of the items found was disturbed. Agents took Segura and Colon to DEA headquarters, leaving two agents behind to secure the premises until a search warrant could be obtained. After the warrant was issued at 6:00 p.m. the following day, a search was conducted that turned up a kilo of cocaine and records of drug transactions.

At trial, the district court ruled that no exigent circumstances justified the initial entry. Finding the first entry illegal, and the evidence observed in the security search its direct fruit, it ordered that evidence suppressed. Although it found the warrant authorizing the later search to be valid, it also ordered the evidence found in the later search suppressed, since, but for the illegal entry and subsequent occupation of the apartment during the 19 hours between the initial entry and the issuance of the search warrant, the evidence might have been removed or de-

stroyed; thus, the later-discovered evidence was also "fruit of the poisonous tree." On appeal, the second circuit affirmed as to the first evidence but reversed the holding requiring the suppression of evidence not in plain view, concluding that to indulge in the speculative possibility that the evidence might have been removed or destroyed to control the admissibility of the later evidence would be "prudentially unsound."

The defendants sought review in the Supreme Court solely on the question of whether the evidence uncovered during the later search should have been suppressed; the government did not seek review. In the part of its opinion that commanded a majority, the Court simply held that

> "[w]hether the initial search was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized.
> . . .
> . . . Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here.
> . . .
> . . . [O]ur cases make clear that evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' clause of the discovery of the evidence." *Segura*, 104 S.Ct. at 3391.

As for the evidence uncovered for the first time during the warehouse search conducted pursuant to the warrant, *Segura* is on all fours and we necessarily affirm the denial of defendants' motion to suppress. Defendants argue that because the application for the warrant fails to mention the prior entry, the warrant was therefore tainted by the prior illegality. The district court properly rejected this argument for the reason that, absent fabrication of evidence, *see Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the mere omission of irrelevant facts from an affidavit constitutes no reason to suppress the warrant. The omission did not "enhance the contents of the affidavit," *United States v. Strini*, 658 F.2d 593, 597 (8th Cir. 1981), nor deceive the magistrate into granting a warrant he would otherwise not have issued, *United States v. Lewis*, 621 F.2d 1382, 1389 (5th Cir. 1980) *cert. denied*, 45 U.S. 935, 101 S.Ct. 1400, 67 L.Ed.2d 370 (1981). The fact of the illegal entry did not detract from the evidence related in the application of the overwhelming probable cause that existed antecedent it.

A harder question is whether the district court should have suppressed the evidence—the marijuana bales—that was in plain view at the time of the illegal entry. As noted earlier, the Supreme Court in *Segura* was not obliged to address whether the evidence observed during the initial illegal search had been erroneously suppressed by the lower courts. As the dissent in *Segura* points out, however, the logic of the majority's reasoning applies equally to the evidence uncovered in the first search as to evidence uncovered in the second: "[t]he warrant provided an 'independent' justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed." *Segura*, 104 S.Ct. at 3400 (Stevens, J. dissenting). That argument is particularly strong in the present case where, unlike in *Segura*, agents entering the premises found them to be deserted, and hence the possibility seems nil that the evidence in plain view would or could have been removed or destroyed before the second search had the illegality not occurred. Put another way, we can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant.

In a closely analogous situation, the Court has recently indicated that it will adhere to the independent justification analysis, ruling that where the location of a body was learned from the defendant through an interrogation in violation of *Miranda*, and the body was found pursuant to the defendant's information, the body need not be sup-

pressed where the prosecution demonstrated that the body would inevitably have been discovered through a sweep search that was already underway. *See Nix v. Williams*, ___ U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

We realize that lower courts presented with the present issue have decided that evidence observed in an illegal search that was also observed and seized in a later search must be suppressed. *See United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974); *see also Commonwealth v. Benoit*, 382 Mass. 210, 415 N.E.2d 818 (1981) (evidence found as direct product of illegal warrantless search not subject to argument that without search, evidence would inevitably have been discovered through a later search pursuant to a warrant). Arguably the Supreme Court in *Segura* also hinted at this result when it stated that "evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." 104 S.Ct. at 3386. Since the chief, and perhaps sole, rationale for the exclusionary rule is to deter future violations of the fourth amendment, *see Leon*, 104 S.Ct. at 3412 (decided same day as *Segura*), arguably all evidence first spied through illegal procedures must be suppressed, no matter how "inevitable" its later, legal, discovery. But the reasoning in *Segura* and, certainly, that in *Nix*, lead us to conclude that the marijuana in plain view here upon entry should not be suppressed. This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress.

C. USE OF THE BLUE AND RED NOTEBOOKS AT TRIAL

During the second search of the warehouse at 345 D Street, agents discovered approximately 500 bales of marijuana. Each bale was marked with a piece of tape bearing two numbers. The numbers on the left of the tape identified the bales; the numbers of the right indicated approximately the weight of each bale.

Agents also seized a red and a blue notebook at the warehouse. The red notebook contains 28 pages with writing on them. Seven of the 28 have a name or apparent name at the top, one of which is "Omar"; six of the seven also have a single list of numbers below the name, which matches the numbers on bales seized during the various searches. The remaining 21 pages contain two columns of numbers. The numbers in the left column run sequentially from 1 to 505; the numbers on the right correspond approximately to the weight of the bales bearing the numbers in the left column. A torn piece of notebook paper matching the paper in the red notebook, with a matching pattern of numbers, was seized from the pocket of James Carter at the time of his arrest. The pages of the red notebook bear the fingerprints of James Carter, Michael Murray, and Joseph Murray.

The blue notebook contains one page of writing, on which the name "Omar" appears. That page also bears James Carter's fingerprints.

The trial court admitted the red notebook into evidence under Fed.R.Evid. 801(d)(2)(E), ruling that there was "a reasonable expectation that [it] might be able to find, at the end of the trial, that it was made by somebody who was engaged in a conspiracy with one or more of the defendants." James Carter objects to the admission of the notebook into evidence. In doing so, Carter does not question the authenticity of the notebook under Fed.R.Evid. 901. We therefore assume that the red notebook is indeed what it seems to be: a record of the weights of bales of marijuana and a partial division of the bales among several persons.

Carter instead excepts to the red notebook's admissibility under Rule 801(d)(2)(E), which provides that "[a] statement is not hearsay if—. . . The statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the

conspiracy." Carter argues that the admissibility of the notebook depends on the fulfillment of a prior condition of fact, namely, the fact that it was kept by a co-conspirator, and that therefore, under Fed.R.Evid. 104(b), the notebook was admissible only if evidence was introduced "sufficient to support a finding" that that condition was fulfilled. Since the government presented no evidence that the notebook was kept in a co-conspirator's handwriting, or any testimony by a witness or admission by a co-conspirator that it produced by one of the co-conspirators, Carter argues us to find that the condition precedent to the notebook's admissibility was not met.

But we think Carter's argument and Rule 801(d)(2)(E) are beside the point. In order for a co-conspirator's written statement to be hearsay, and thus to be inadmissible unless defined not to be hearsay under 801(d)(2)(E), the written statement must be a statement. *See* Fed.R.Evid. 801(a) defines a statement to be "(1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The only assertions made in the notebook are that certain bales have certain weights, and that certain bales are assigned to certain persons. There is no issue as to the truth of these assertions, regardless of who wrote them down. Use of the red notebook as real evidence linking Carter and the two Murrays to the marijuana operation does not involve the admission of any statements made in the notebook to prove the truth of the matters they assert, and therefore presents no hearsay problem; since the authenticity of the red notebook is unquestioned, the notebook is clearly admissible for this issue.

The blue notebook was admitted at trial solely for the purpose of connecting Carter to the warehouse by means of the fingerprints found on it. An appropriate limiting instruction was given to the jury. The trial court denied Carter's request that the writing be covered over when the blue notebook was submitted to the jury, reasoning that to do so would invite its curiosity.

Carter argues that the district court's refusal to cover the writing constitutes error. He notes that the name "Omar" appeared on that page, as it did atop a page of bale numbers in the red notebook. We fail to see what prejudice could result from the exposure of the jury to the word "Omar," and we think the trial court's decision simply to give a limiting instruction well within the scope of the discretion accorded it on evidentiary questions. *See, e.g., United States v. Sorrentino*, 726 F.2d 876, 886 (1st Cir. 1984).

Affirmed.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF MASSACHUSETTS CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES CARTER, *et al.*,

Defendants

CRIMINAL No. 83-102-S

MEMORANDUM AND ORDER ON VARIOUS MOTIONS OF THE DEFENDANTS TO SUPPRESS AND TO DISMISS

December 23, 1983

SKINNER, D.J.

Defendants James Carter, Joseph Murray, Michael Murray, Arthur Barrett, and John Rooney have been indicted in two counts for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, and conspiracy to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts I and III).

Defendants James Carter, Joseph Murray, Michael Murray, Stephen King, and Christopher Moscatiello have been indicted in two counts for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, and conspiracy to possess marijuana in excess of one thousand pounds with intent to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts II and IV).

Defendants James Carter, Joseph Murray, and Michael Murray have been indicted for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, in violation of Title 21, United States Code, Sections 841(a)(1) and 941(b)(). (Count V).

The indictments arise out of arrests made on April 6, 1983. All of the defendants allegedly participated in a drug transaction on that date, and were apprehended in the course of that transaction.

All the defendants except Barrett, who has disappeared, have moved to suppress evidence seized in several searches, some with and some without warrant and also have moved to dismiss the indictment because of the illegality of evidence presented to the grand jury.

In summary, the evidence supports a finding that the following events occurred: Meetings and maneuvers by the defendants in the morning alerted surveillance agents of the Drug Enforcement Agency ("DEA") and the Federal Bureau of Investigation ("FBI") that a drug transaction was possibly in the offing. In the afternoon, some of the defendants, presumably Carter and Murray, loaded marijuana into a white Ford truck and a green Dodge camper at a warehouse at 345 D Street in South Boston. The loaded vehicles were driven from the warehouse and turned over to other defendants who were later arrested in or around the vehicles. In the afternoon and evening after the arrests, agents searched the following areas: (1) the white Ford truck (without warrant); (2) the green Dodge camper (with warrant); (3) the warehouse at 345 D Street (first without and later with warrant); and (4) a garage

Sylvester Road, Dorchester, Massachusetts (with warrant). There were other searches conducted, but since they produced no significant material, there is no occasion to enter any orders with regard to them.

I. FINDINGS OF FACT.

A. Information linking the defendants to the drug trade.

The government had information from three informants linking defendants Rooney, Barrett, Joseph and Michael Murray to the drug trade. The first informant, Glen Castro, described from personal knowledge various conversations and transactions involving defendants Rooney and Barrett in early 1983, including (i) Rooney's delivery to Castro of a bale of marijuana; (ii) a conversation with Barrett where Barrett described the counting of $1 million in drug money; (iii) a conversation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view); (iv) generally, the joint involvement of Rooney, Barrett and others in drug traffic. At the time of his interview, Castro was in prison for bank robbery in New Hampshire.

Another informant, one who had provided reliable information to the FBI in the past, had told an agent that Barrettt was selling marijuana and cocaine out of his home in April, 1982. A third informant had described conversations between Barrett and Joseph Murray in March, 1983 about an incoming marijuana shipment, and had averred in a general way that Barrett was part of the "Joe Murray crew," a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Sporadic surveillance beginning in July or August of 1982 confirmed the informants' information as to the regular association of Rooney and Barrett, and as to their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays occurred in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received in March, 1983 indicated that there was a warehouse somewhere in South Boston which was used to store marijuana.

B. Surveillance and arrest of defendants.

On April 5, 1983, a surveillance was conducted by Special Agents of the FBI, which resulted in the following observations:

> (a) 11:45 a.m.—John Rooney came out of 15 Sylvester Road, Dorchester, Massachusetts, entered a white Ford truck (MA Reg. AD 1994), and proceeded on Gallivan Boulevard to the Southeast Expressway, arriving at the Pier Restaurant, Northern Avenue, Boston, at 11:52 a.m. and stopping briefly in the parking lot.
>
> (b) 11:58 a.m.—Arthur Barrett, driving a white Mercury Brougham (MA Reg. 937599), left the Pier Restaurant Parking lot and proceeded down Northern Avenue toward the Southeast Expressway. Barrett stopped at the side of the road and ducked down in the driver's seat.
>
> (c) 11:59 a.m.—Rooney was observed driving the white Ford truck down Northern Avenue toward the Southeast Expressway.
>
> (d) 12:07 p.m.—The white Ford truck was observed parked at 15 Sylvester Road, Dorchester.
>
> (e) 12:11 p.m.—Arthur Barrett arrived at 15 Sylvester Road, Dorchester, driving his white Mercury Brougham. At 12:15 Barrett left his vehicle on the street, walked toward the garage at 15 Sylvester Road and then returned to his vehicle.
>
> (f) 12:12 p.m.—A black Chevrolet Blazer (MA Reg. AE2117) left the driveway at 15 Sylvester Road and Rooney backed the white Ford truck into the driveway and to the door of the garage.

(g) 12:17 p.m.—Rooney left the residence at 15 Sylvester Road, entered Barrett's vehicle and he and Barrett drove toward Boston on Gallivan Boulevard. (Tr. 2-19 to 2-24).

On April 6, 1983, another surveillance was conducted by Special Agents of the FBI and DEA, which resulted in the following observations:

(a) 11:00 a.m.—The white Ford truck (MA Reg. AD 19994) was observed parked next to the white Mercury Brougham (MA Reg. 9375899) on Northern Avenue with Arthur Barrett and John Rooney sitting in the front seat of the Mercury; at 11:12 a.m., Barrett and Rooney drove in the Mercury to the vicinity of the Pier Restaurant parking lot, turned around and returned to their former parking location. (Tr. 2A-5).

(b) 11:27 a.m.—A blue van (MA Reg. AB 66685) with ladders on the roof parked next to Barrett's vehicle and the driver of the blue van got out and spoke with Barrett. At that point, the white Ford truck backed out onto Northern Avenue and proceeded in the direction of the Southeast Expressway and was followed by surveillance agents. Suddenly, the white Ford truck made a U-turn and passed the surveillance agents who noted the driver to have black hair and be wearing sunglasses. Also, at this time, John Rooney was observed sitting in the passenger seat of Barrett's vehicle but Barrett was not seen. (Tr. 2A-5 to 2A-7).

(c) 11:50 a.m.—The white Ford truck, being driven by a man wearing a dark green shirt and sunglasses, later identified as Michael Murray, returned to the Northern Avenue area heading back to the original parking spot with an unidentified passenger. (Tr. 2A-8 to 2A-9; 3-9 to 3-10). The truck pulled alongside the white Mercury (Barrett's vehicle). (Tr. 2A-9; 3-11).

(d) 12:03 p.m.—The white Ford truck backed out onto Northern Avenue and drove toward the Southeast Expressway closely followed by the white Mercury. At this time, John Rooney was driving the white Ford truck and Arthur Barrett was driving the white Mercury. Surveillance agents followed the vehicles on the Southeast Expressway where Barrett continued to maintain a position directly behind the white Ford van, leaving no room for any vehicle to move in behind the truck. (Tr. 2A-9 to 2A-10; 3-12 to 3-14).

(e) 12:15 p.m.—The white Ford truck and the white Mercury arrived at 15 Sylvester Road. Rooney backed the truck into the driveway and up to the garage located at the end of the driveway. (Tr. 3-15). Objects were placed on either side of the truck, obstructing any view into the garage. (Tr. 8-4 to 8-6).

(f) 12:41—The white Ford truck driven by Rooney and the white Mercury driven by Barrett left 15 Sylvester Road and drove to the southeast Expressway, and on to the area of Santoro's Sub Shop, Northern Avenue. During this drive, Barrett maintained a position about 100 feet behind the white Ford truck. (Tr. 3-16 to 3-17). Upon arrival, the truck parked at Santoro's and the white Mercury proceeded further up the road, made a U-turn and returned, parking next to the white truck. (Tr. 3-17 to 3-18).

(g) 12:50 p.m.—The blue van (MA Reg. AB 66685) was observed parked in a parking lot adjacent to a white cinderblock building at 345 D Street, South Boston, Massachusetts. (Tr. 2A-12 to 2A-13). Also, at this time, other surveillance agents observed Barrett and Rooney enter Santoro's Sub Shop for a short time. Rooney was then observed to go to a nearby pay phone and then join Barrett in the white Mercury. A short time later, Barrett walked to the same pay phone, appeared to make a call and returned to his car, while Rooney paced back and forth in front of Santoro's, apparently observing traffic driving on Northern Avenue. (Tr. 7-55 to 7-56).

(h) 1:10 p.m.—A 1982 GMC Jimmy (MA Reg. 129 KGD, registered to Joseph Murray, 51 Allston Street, Charlestown, Massachusetts) was observed parked

next to the D Street door of the building at 345 D Street, South Boston. (Tr. 3-18 to 3-19).

(i) 1:15 p.m.—The blue van was observed driving on Northern Avenue toward the Southeast Expressway. (Tr. 7-55).

(j) 1:25 p.m.—The blue van returned to Northern Avenue from Atlantic Avenue, pulled into the parking lot of Anthony's Pier Four Restaurant and parked beside a red Jeep Cherokee (MA Reg. 180 GVJ). (Tr. 7-57). Three men were observed meeting and apparently engaging in conversation. These men were later identified as Michael Murray, James Carter, and Stephen King. (Tr. 7-58). After a brief meeting, Carter and Murray returned to the blue van, King returned to the red Cherokee and they proceeded to Santoro's Sub Shop with the blue van in front and the red Cherokee directly behind. (Tr. 7-58).

(k) 1:30 p.m.—Murray, Carter, Barrett, and Rooney met at Santoro's and appeared to be in conversation. Murray then entered the white Ford truck and Carter was lost from sight going behind the white Ford truck. Murray, driving the white Ford truck and Carter driving a green Dodge camper (MA Reg. AD 71871) backed onto Northern Avenue and proceeded to the intersection of D Street and First Street, South Boston. (Tr. 7-59).

(l) 1:45 p.m.—The green Dodge camper was observed to park in the lot at the left of 345 D Street and the white Ford truck stopped on the First Street side of the 345 D Street building, next to two large black overhead doors. (Tr. 6-4 (Powers)). The right hand overhead door was raised by someone apparently inside the building, and the white Ford truck immediately backed into the building followed closely behind by the green Dodge camper. (Tr. 3-20; 6-4 (Powers)). The overhead door was immediately pulled down and closed. (Tr. 6-5 (Powers)).

(m) 2:05 p.m.—The same overhead door was opened and the green Dodge camper and white Ford truck immediately drove out of the building (345 D Street).

(Tr. 3-22; 6-6 (Powers)). Surveillance agents following the two vehicles drove in front of the building and observed a white male pulling a chain to lower and close the overhead door. (Tr. 6-7 (Powers)). Also, at this time, the agents observed inside the building a second individual and a tractor trailer rig with a large dark colored container on top. (Tr. 6-7 (Powers)).

(n) The green Dodge camper was followed from 345 D Street to the parking lot of the Pier Restaurant, Northern Avenue, where it parked facing Northern Avenue. The white Ford truck took the same route but was separated from the green camper by a traffic light (Tr. 6-8 (Powers)), and was observed at 2:10 p.m. to drive past the Pier Restaurant parking lot, where the green Dodge camper followed directly behind the white truck. Both vehicles proceeded to Santoro's on Northern Avenue and parked on the street, one behind the other, to the right of Santoro's. (Tr. 6-9 (Powers)). Murray got out of the white Ford truck and walked toward Santoro's. At the same time, Rooney was observed walking from the area of Santoro's toward Murray. Both men converged, exchanged a set of keys from Murray to Rooney and kept walking without stopping and without any acknowledgment. (Tr. 6-9 (Powers)). Rooney walked directly to the white Ford truck, entered it, started the engine, and drove to the Southeast Expressway, southbound. (Tr. 6-9 (Powers)).

(o) Shortly after 2:10 p.m., the blue van was observed on Northern Avenue, where it came to a stop in the vicinity of a flower vendor at the roadside, (Tr. 3-24), at which time it was approached by Christopher Moscatiello. (Tr. 3-24, 4-18). Moscatiello then crossed Northern Avenue to the green Dodge camper, entered the camper and drove on Northern Avenue to Sleeper Street. (Tr. 6-11 to 6-12 (Powers)). At Sleeper Street, the green Dodge camper stopped without any traffic or traffic signals impeding its progress. After a short time, the red Jeep Cherokee driven by Stephen King, pulled up directly behind the green Dodge camper.

(Tr. 6-11 (Powers)). The green Dodge camper immediately drove on to Massachusetts Turnpike by way of the Southeast Expressway. During the entire ride to the Massachusetts Turnpike, the red Cherokee followed directly behind the green Dodge camper, never allowing enough room for another vehicle to move between the two vehicles. Also during this trip, the green Dodge camper made several lane changes and was followed closely each time by the red Cherokee. (Tr. 6-14 (Powers)).

(p) At 2:25 p.m., the green Dodge camper and the red Cherokee were stopped by surveillance agents while in a toll line at the Allston Toll Plaza. Christopher Moscatiello was removed from the green Dodge camper and Stephen King from the red Cherokee and each was placed under arrest. (Tr. 6-15 (Powers)). Special Agent Powers (DEA) entered the green Dodge camper to move it out of the toll plaza line and off to the roadside. (Tr. 6-15 (Powers)). Agent Powers then looked to the rear of the cab and saw, through an angular opening in the curtains to the rear window of the camper area of the vehicle, burlap bales, which he knew to be a common packing for marijuana. (Tr. 6-16 (Powers)). These facts were broadcast to all other agents. (Tr. 6-27 (Powers)).

(q) After the two vehicles were moved to the side of the road, Moscatiello and King were placed under arrest, informed of their rights and transported to the DEA Boston office. (Tr. 6-36 (Powers)). The two vehicles were seized and removed to the J. F. Kennedy Federal Building, Boston.

(r) At 2:30 p.m., John Rooney, who had been followed from the Northern Avenue area, arrived at 15 Sylvester Road, Dorchester, and backed the white Ford truck into the driveway. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he observed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's hands at the time of his arrest and Special Agent Boeri (DEA) used one

of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. (Tr. 8-15 to 8-17). The garage was then secured by the stationing of agents outside it, (Tr. 8-21) and Agent Boeri advised the other agents involved in the surveillance of the facts he had learned by radio. (Tr. 8-20). At this time, the location of Arthur Barrett was unknown.

(s) At approximately 2:20 p.m., other agents drove into the parking lot of the Pier Restaurant and observed two males seated in separate vehicles adjacent to one another. (Tr. 2A-20, 4-33). The man seated in a green pickup truck, later identified as Craig Billingham, ducked down in the driver's seat. The agents approached and observed the man whom they identified as Michael Upton in a gray Mercury Zephyr. (Tr. 2A-20, 4-33). At this time, the blue van drove slowly by the Pier Restaurant parking lot. (Tr. 2A-21). The agents stopped the blue van and subsequently identified James Carter and Michael Murray as the passenger and driver of the van. (Tr. 2A-22, 3-25). Carter and Murray were placed under arrest when the agents received the information by radio from agents at Sylvester Road, Dorchester, and at the Allston Toll Plaza, Massachusetts Turnpike that the green camper, red Cherokee and white truck had been stopped and the occupants arrested. (Tr. 2A-23, 4-36 to 4-37, 6-11 (Garibotto)).

(t) At approximately 2:30 p.m., agents had moved to the area of the white cinderblock building at 345 D Street, South Boston, where they observed a short white male, approximately 45 years old, with swept black hair, gloves in his rear pants pocket and smoking a pipe. (Tr. 3-28). This man was pacing back and forth on D Street in front of the white cinderblock building, looking at traffic as it passed. (Tr. 3-29). The agents drove around the block and the man was no longer seen outside the building. (Tr. 3-30, 6-11 to 6-12 (Garibotto)).

(u) At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street, by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building through a window but there was no exterior position affording a view of the general interior of the building. (Tr. 3-31). At all stages of this process, the agents were regularly stating their identities as federal law enforcement agents. (Tr. 3-31). Finally, in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence, the agents made a forced entry of the building. (Tr. 3-32). After a brief view of the premises, they determined that no one was inside (Tr. 3-33), detected both a strong order of marijuana and observed many burlap wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside (Tr. 3-34, 6-13 to 6-17 (Garibotto)).

(v) At approximately 3:00 p.m., Arthur Barrett arrived at 15 Sylvester Road, Dorchester, and was immediately placed under arrest. (Tr. 8-21). His white Mercury was seized and he and Rooney were transported to DEA Boston office.

The FBI and DEA agents involved in the case testified that the vehicle exchanges are a common mode of transferring large purchases of marijuana and that the pattern of vehicular movement described above was indicative to them, as experienced law enforcement officers, of an imminent illicit sale of a large quantity of marijuana. The decision to arrest the defendants and to conduct the above searches and seizure was made jointly by supervising agents of the FBI and the DEA.

The times stated are very approximate, and the defendants strongly contest the times stated in items (s) and (u). They offered evidence that these events occurred earlier than stated, and that the seizer of the white Ford truck, green Dodge camper and the red Cherokee came

after the warrantless entry by the agents into the D Street warehouse and the observation by the agents of quantities of marijuana therein. The defendants' witnesses attempted to fix time by estimating time elapsed between various events. This form of estimating time is notoriously inexact. It is common experience that one's perception of the lapse of time is subject to a number of subjective variables. The agents' concept of time is probably not a great deal better in terms of minutes. I do accept their account of the sequence of events as being more probable than otherwise. *United States v. Matlock*, 415 U.S. 164, 177 (1974); *United States v. Ochs*, 461 F.Supp. 1, 7 (S.D. N.Y.), *aff'd*, 636 F.2d 1205, *cert. den.*, 451 U.S. 1016 (1981).

C. Searches and seizures.

The agents who arrested Rooney at 15 Sylvester Road also searched the white Ford truck, found bales of marijuana in the truck and seized both the truck and the bales of marijuana. The agents who arrested Moscatiello seized the green Dodge camper. Thereafter the agents secured search warrants for the green camper, the D Street warehouse and the garage at 15 Sylvester Road. The resulting search revealed a substantial number of bales of marijuana in the back of the camper, in the warehouse and in the garage.

In their application to the magistrate for the search warrant for the D Street warehouse, the agents did not reveal the fact that they had previously made the forced entry into the warehouse.

II. RULINGS OF LAW.

Critical to the resolution of the motions to suppress is a determination of whether the pattern of vehicular movements on April 5, 1983 and again on April 6, 1983 (paragraphs (a) to (o) above) constituted probable cause for the subsequent arrests and seizures, and by extension for the issuance of search warrants. This pattern must be considered in the light of the agents' information that Barrett, Rooney and the Murrays were engaged in the drug traffic.

In *Illinois v. Gates*, 103 S. Ct. 2317 (1983), the Supreme Court discussed the standard for determining the existence of probable cause:

> [W]e deal with . . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Evidence which would have little significance to a layman may provide a meaningful pattern to experienced law enforcement officials. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *United States v. Manchester*, ___ F.2d ___ (1st Cir. July 7, 1983) (No. 82-1371 slip opinion).

If there was probable cause to believe that the pattern of the defendants' activity revealed an ongoing drug transaction, the search of the white panel truck was reasonable. *United States v. Ross*, 456 U.S. 798 (1982). Even though the truck had temporarily come to rest, the exigency was the same as it is in cases where a vehicle has been stopped on the highway.

If the pattern of activity, taken together with the informant's information, constituted probable cause for the arrest of the defendants, it is clear that the recitation of these events was a sufficient basis for the issuance of the various search warrants. The one further question concerning the search warrants is whether the warrant for the D Street warehouse was vitiated by the prior warrantless entry of the warehouse. If the entry of the warehouse had been illegal, any recitation of the observations made by the agents in the application for a search warrant would have rendered the search warrant invalid as fruit

of an illegal search. That was not the case, however, and there was no such taint.

The defendants assert, however, that the *failure* to reveal the prior entry itself tainted the issuance of the search warrant. Deliberate misstatements by agents in the application for a search warrant vitiate the warrant. *Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Belculfine*, 508 F.2d 58 (1974). However, the courts have uniformly held that an *omission* of facts from an affidavit, without more, does not constitute a false statement made with intent to deceive within the meaning of *Franks v. Delaware*. *See United States v. Stini*, 658 F.2d 593, 597 (8th Cir. 1981); *United States v. Lewis*, 621 F.2d 1382, 1389 (5th Cir.) *cert. denied* 450 U.S. 935 (1981); *United States v. Botero*, 589 F.2d 430, 433 (9th Cir.) *cert. denied* 441 U.S. 944 (1979). The omission of information regarding the earlier entry into the warehouse from the warrant affidavit was not a false statement, and it did nothing to "enhance the contents of the affidavit," *United States v. Stini*, 658 F.2d at 597, or to deceive the magistrate into granting the warrant. *United States v. Lewis*, 621 F.2d 1382 (5th Cir. 198) is directly on point. There, DEA agents had made a warrantless search of a laboratory, and omitted mention of it in the warrant affidavit. The defendants argued that the agent's failure to inform the magistrate of the prior search was an intentional and material misrepresentation regarding invalidation of the warrant. The magistrate disagreed, and the Court of Appeals affirmed.

The defendants also suggest that because the affidavit misidentifies the source of the information that there was a marijuana warehouse in South Boston, the warrants are invalid. Although the agents were confused about the source of the tip, they had, in fact, received the tip. The error in attribution was insignificant.

Nighttime searches for controlled substances are authorized by statute. 21 U.S.C. §879. *Gooding v. United States*, 416 U.S. 430, 458 (1974).

CONCLUSIONS.

The critical question in this case is whether the pattern of activity observed by FBI and DEA agents on April 5 and 6, 1983 furnished probable cause for the arrest of the defendants, the seizure and search of the vehicles and the eventual searches under warrants. Reliance on the expertise of the law enforcement officers introduces a subjective element into the assessment of probable cause which on a sliding scale degenerates to mere hunch or guesswork. What is more, there is no opportunity to test the officers' track record, as one can test, for instance, the performance of a drug-sniffing police dog. In all the cases which come to the attention of the courts, the police have been correct. We do not know how many warrantless searches have been fruitlessly inflicted on the innocent.

In this case, the pattern of activity by itself, even though consistent with the mode of operation of drug dealers, would not of itself justify the officers' actions. Similarly, the information gathered from informers concerning the defendants' prior drug related activities, standing alone, were not sufficiently specific as to present activity to justify arrest, seizure or search. The informers' information, however, illuminates the unusual but otherwise inexplicable activity of the defendants of April 5 and 6. On balance, I am persuaded that the officers were justified in arresting the defendants searching the white Ford truck and seizing the green Dodge camper. One of the significant facts was the collective nature of the decision of arrest, seizure and search. I find it was the collective and considered judgment of experienced supervisors of both FBI and the DEA that there was a drug transaction in the process of consummation. The Fourth Amendment does not impose on law enforcement a foolish paralysis.

It follows that the same facts, with the addition of the results of the search of the white Ford truck and the observation of marijuana in the green Dodge camper, furnished probable cause for the issuance of search warrants.

The affidavit in support of the various applications did contain an averment that the agent who stopped the green Dodge camper smelled marijuana coming from the cab of the vehicle. As a result of taking a view of the camper I concluded that it was improbable that any odor smelled in the cab came from the camper section of the truck where the marijuana was found since the camper was a separate fully enclosed unit. I have not found and do not find, however, that the agent was making a deliberate material misstatement sufficient to invalidate the search warrant in accordance with *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974). In *Belculfine*, the agents' reported observation was physically impossible. In this case, it was not impossible that the odor of marijuana came from some source within the cab.[1] That particular information was not crucial, however, since the agent also observed a bale which looked like a bale of marijuana.

Accordingly, I find and rule that none of the above arrests, searches or seizures violated the Fourth Amendment. There were searches at other locations but since no evidence was found or seized at those locations, there is no point in discussing them in this memorandum.

SUPPLEMENTARY FINDINGS AND RULING ON STANDING.

The foregoing makes moot the issue of standing to complain of the various searches and seizures. To complete the record I make the following findings and ruling:

1. Rooney had a sufficiently authorized possessory interest in the white Ford truck to give him standing to complain of the search thereof. He has no standing with respect to any other search and seizure. No other defendant has standing with reference thereto.

---

[1]At the view I was shown a purported bale of marijuana which had no distinguishable odor at all. A subsequent view in another case had led me to believe that fresh or damp marijuana does have a distinctive, pungent and clinging odor.

2. Moscatiello had a sufficiently authorized possessory interest in the green Dodge camper to have standing to complain of the search thereof. He has no standing with respect to any other search. No other defendant has standing with reference thereto.
3. None of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer.
4. No defendant has standing to complain of the search of the garage at 15 Sylvester Road, since the owner of the house had obvious access to it, and there was accordingly no legitimate expectation of privacy.

ORDER

The various motions to suppress are DENIED. The motions to dismiss because of the presentation of illegal evidence to the grand jury are DENIED for the same reasons.

WALTER J. SKINNER

United States District Judge

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1263

UNITED STATES,
Appellee,

v.

MICHAEL F. MURRAY,
Defendant, *Appellant.*

JUDGMENT

Entered August 26, 1985

This cause came on to be heard on appeal from the United States District Court for the District of MASSACHUSETTS, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ _____
Francis P. Scigliano
Clerk.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1192

UNITED STATES OF AMERICA,
Appellee,

v.

CHRISTOPHER MOSCATIELLO,
Defendant, Appellant.

No. 84-1193

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN M. ROONEY,
Defendant, Appellant,

No. 84-1262

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES D. CARTER,
Defendant, Appellant.

No. 84-1263

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL F. MURRAY,
Defendant, Appellant,

Before: CAMPBELL, *Chief Judge,* BREYER, *Circuit Judge,* and WEIGEL,* *Senior District Judge.*

ON PETITION FOR REHEARING
Entered October 31, 1985

For purposes of clarification, we amend our opinion issued August 26, 1985 as follows:

On page 11, first full paragraph, line 1, after "that", insert the words "at least part of."

On page 11, first full paragraph, line 3, after "§ 3161(h)(1)(F)," add ", in respect to those particular motions."

On page 11, first full paragraph, last line, add: "This is not to say, of course, that more than 30 days can be *excluded* under section 3161(h)(l)(J) for deciding the suppression motions. Rather, we simply hold that the additional five days which must be excluded to avoid a violation of the Act are excludable under section 3161(h)(l)(F) as constituting time reasonably attributable to the remaining nonsuppression motions."

On page 12, first paragraph, line 2, "amounted to 45 days" should be changed to read "did not exceed 70 days."

The petition for rehearing is in all other respects denied.

By the Court,
Francis P. Scigliano
Clerk.

---

*Of the Northern District of California, sitting by designation.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 84-1262

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES D. CARTER,
Defendant, Appellant.

No. 84-1263

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL F. MURRAY,
Defendant, Appellant.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before
Campbell, *Chief Judge,*
Coffin and Breyer, *Circuit Judges.*

Marshall D. Stein, Cherwin & Glickman, Brian J. McMenimen and *Gargiulo & McMenimen* on brief for James D. Carter. *Gary C. Crossen,* Assistant United States Attorney, and *William F. Weld,* United States Attorney, on brief for appellee.

October 7, 1986

CAMPBELL, *Chief Judge.* Following our decision in this case, the Supreme Court vacated and remanded to us for reconsideration (on speedy trial grounds) under *Henderson* v. *United States,* ___ U.S. ___, 106 S. Ct. 1871 (1986).

We have thoroughly reviewed our discussion of the speedy trial issue, appearing in 771 F.2d at 594-95. While we now modify our reasoning in one major respect, *infra,* at 6-9, we believe that the result we originally reached remains correct and is in harmony with the Supreme Court's opinion in *Henderson.* Accordingly, we affirm defendants' convictions.

In our previous opinion we started with the premise that the 30 days from October 17 (when the district court completed hearings on the suppression motions) to November 16, 1983, were excludable as being the 30 days provided in subsection (J) of 18 U.S.C. § 3161(h)(1) (1985) for motions that are "actually under advisement by the court." No one questions our reasoning in that respect. A problem arises, however, because after excluding the 30-day period attributable to the suppression motions, there is still a total of 75 non-excludable days, or five days over the limit set by the Speedy Trial Act. The question thus arises whether there is any basis for excluding at least five more days.

In answering "yes" in our original opinion, we reasoned that the additional five days (and more) were excludable under subsection (F), of 18 U.S.C. § 3161(h)(1), as falling within the period necessary to decide certain *other* motions, these being motions for severance, for orders in limine, election of counts, and to control the sequence of the government's presentation of evidence at trial. These *non*-suppression motions had been under advisement since the preceding May, but were not actually decided, according to the judge, until after he first made up his mind about the suppression motions. The order deciding these

other motions was issued December 21, 1983.[1] The judge explained his reason for not deciding these until after decision of the suppression motions as follows:

> These motions [*i.e.*, the other, *non*-suppression motions] primarily concerned the ordering of the trial. The summary judgment [sic, suppression] motion, however, was dispositive. If [they] had been allowed, the government would not have been able to go forward with trial. I conclude that it was reasonable to hold these motions until I had decided the motion to suppress.

We reasoned that at least five days of the period from November 16, 1983, up to decision of the suppression motions in late December—during all of which period the other motions remained constantly under advisement—was excludable under subsection (F), as

> delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, *or other prompt disposition of, such motion.*[2]

In other words, because the non-suppression motions were not ripe for determination until the court had determined the suppression motions, and because the latter were not

---

[1] The opinion on the suppression motions was issued on December 23, 1983, two days later. However, Judge Skinner stated that he had not actually considered the non-suppression motions until *after* he had decided the motions to suppress. This is understandable notwithstanding the two-day hiatus in dates, since the court wrote a comprehensive opinion disposing of the suppression motions; these latter constituted the main basis of defendants' case (two of the four defendants pleaded guilty conditionally, reserving their right to appeal from the rulings on the suppression motions). It is reasonable to suppose that the court had made a final determination of where it stood on the suppression motions sometime before the actual release of its comprehensive opinion on December 23, using the interim to edit and polish its opinion.

[2] Unlike the suppression motions, the other motions were never the subject of a hearing, hence the emphasized language applied to them.

resolved until after mid-December, we thought it proper to exclude the November 16 to December 21 period as time resulting from necessary delay in effecting a disposition of the *non*-suppression motions.

We recognize that *Henderson* indicates that for pretrial motions without a hearing (as the non-suppression motions were), only the time until "the court receives all the papers it could reasonably expect" is normally excludable under subsection (F). 106 S. Ct. at 1876. At that point the motions would be considered "under advisement," and there must be "prompt disposition" of those motions, that is, 30 days under subsection *(J). Id.* Literally, this might mean that the non-suppression motions were "under advisement" as of May 27, 1983, when all the necessary papers were filed with the court. And none of the period from November 17 to December 21 could be excluded.

But in providing that unheard motions are "under advisement" when all necessary papers are filed, we believe the Court had in mind the usual motion, which, of course, is ready to be decided once all the papers are in. The present motions were unique, in that while they were in and of themselves not difficult, and while the necessary papers had been received as early as May 27, they were still not ripe for decision until the court made up its mind on the suppression motions. And these latter were distinctly not easy or obvious, as the length of both the district court's and our own opinions on the suppression issues attest. As the government argues, in this kind of situation, *Henderson* reasonably permits us to read subsection (F) to include time for other preliminaries, beyond simply filing papers, where such are essential before motions are ripe for decision, *i.e.*, can meaningfully be taken under advisement.

We are helped to this result by analogous reasoning in *Henderson* itself. In discussing whether subsection (F) could also exclude *time after a hearing* on a motion, despite the

fact that subsection (F), literally read, only says time "through the conclusion of the hearing," the *Henderson* Court said that it was "convinced" that time while "a district court awaits additional [post-hearing] filings from the parties that are needed for proper disposition of the motion" can also be excluded under subsection (F). The Court reasoned that "[t]he provisions of the Act are designed to exclude all time that is consumed in placing the trial court *in a position to dispose of a motion.*" 106 S. Ct. at 1877 (emphasis added).

Applying this reasoning to this case, we can understand the district court's awaiting resolution of the suppression motions before believing itself in a position to dispose of the non-suppression motions. Since the court had not resolved the suppression motions until after mid-December, it is arguable that the entire period through then is excludable under subsection (F) as time needed by the trial court before it was "in a position to dispose of" the suppression motions. *Id.* Certainly the Supreme Court's holding—that *any* (and not just reasonable) delay before a motion can be taken under advisement is excludable under subsection (F)--also suggests that this interpretation is permissible.

There is, however, one problem with this analysis to which we may not have paid sufficient attention in our original opinion. Both the Speedy Trial Act and *Henderson* make clear that once a hearing is held, and all needed papers are in, a heard motion (like the suppression motions) may be held under advisement for purposes of computing excludable time only for 30 days. That period expired for the suppression motions on November 16, 1983. This 30-day requirement is expressly set out in subsection (J). While it is understandable and, in a general sense, was perhaps not unreasonable, that these complex suppression motions consumed more than 30 days of the time of a busy trial judge, who also has many other matters to attend to, it is absolutely clear that subsection (J) grants

only 30 days of excludable time. (That is, no more than 30 days is excludable unless some other provision, such as clause (A) of section 3161(h)(8), which was not invoked here, applies.)

The question thus arises whether, where the judge has exceeded the 30 days allowed under subsection (J) to decide the suppression motions, we can properly exclude any part of the period thereafter ensuing until he actually decided those motions, as time under subsection (F) properly attributable to the disposition of the *non*-suppression motions. It is arguable that where the Act specifically allows only 30 excludable days to decide the suppression motions, we should not countenance the longer decisional period actually employed, even if otherwise "reasonable," as a yardstick for timing the remaining motions. This argument gains additional force from the language in subsection (F) which requires that, in cases of motions that do not require a hearing, the excludable time runs only from filing through the "prompt disposition of" the motion. Can it be said that motions dependent upon other motions have been *promptly* decided if the preceding motions were not themselves, by Congress's 30-day standard, promptly decided?

But we need not pursue this point further, since, upon further reflection, we find that there are an extra five excludable days here even upon a far more restricted reading of subsection (F)—a reading which does not open it to the abuse that some might fear were we to recognize an unlimited period of time (or even a "reasonable" time beyond 30 days) for deciding the underlying motions. Even if we strictly credit the court with only 30 days to decide the underlying suppression motions, *i.e.*, until November 16, 1983, the court is still entitled to further credit for up to 30 days additional time within which to decide the non-suppression motions, since these latter motions were not ripe for decision—*i.e.*, were not actually "under advisement"—until the underlying suppression motions were resolved. Subsection (J) and *Henderson* make this clear. In

discussing motions that require no hearing, and hence require a "prompt disposition," *Henderson* says that the " 'point at which time will cease to be excluded' is identified by subsection (J), which permits an exclusion of 30 days from the time a motion is actually 'under advisement' by the court." 106 S. Ct. at 1876. Here, assuming as we do that the district court was not in a position to rule on the non-suppression motions until after it had determined the suppression motions, but also that it *had to* rule on the latter by November 16, this still leaves the court with 30 additional excludable days beyond November 16 to determine the non-suppression motions. This results in further excludable time from November 16 until December 15, 1983. Since, in fact, only five additional days were needed to comply with the Speedy Trial Act, the trial was in any event timely.[3]

Affirmed.

Dissent follows.

COFFIN, *Circuit Judge,* dissenting. I have considerable sympathy for the majority's approach, recognizing the intial logic of its conclusion. Since subsection (J) allows the district court 30 additional days beyond November 16 to determine the non-suppression motions, and only five additional days were needed in this case to comply with the Speedy Trial Act, it seems at first blush reasonable to conclude that the trial was timely.

[3] We disagree with our dissenting colleague's view that the non-suppression motions were not "actually under advisement" for five days. Congress, as our colleague now concedes, allocated up to 30 days more to the non-suppression motions assuming they were "actually under advisement." While we cannot be sure precisely how the judge divided his time, we think the fair meaning of the "actually under advisement" language was sufficiently met in respect to the second motions where, in actual fact, the suppression and non-suppression motions remained pending together from November 16 to at least December 21, and where both sets of motions were decisionally intertwined in the present unique manner. In such circumstances, we do not believe Congress would have anticipated more of a showing than was made that the second set of motions were actually under advisement for purposes of the Speedy Trial statute.

The problem with this conclusion, however, arises from the language of subsection (J). The statute very specifically provides an exclusion for the period during which "any proceeding concerning the defendant is *actually under advisement* by the court" (emphasis added). This "under advisement" period is *limited* to 30 days. The majority assumes that because 30 days are available, it is proper to allocate five of them to deciding the non-suppression motions, regardless of the time actually devoted to those motions. But I do not see how we can say *any* time, up to 30 days, is excludible when subsection (J) allows an exception only for days *actually* used to decide the remaining motions. Although there is an argument for allowing some "play in the joints," it must be remembered that the Speedy Trial Act starts with the presumption that if a trial is not held within 70 days of indictment, the Act is violated. That time may be lengthened only if one of the enumerated exceptions applies. The subsection that applies here, (J), does not make a 100-day trial delay lawful; it merely allows an extension during the time motions actually were under advisement.

Moreover, my brethren's approach suffers from the same problem they sought to avoid by adopting it, namely the improper extension of the 30-day period allowed under (J) for the suppression motions. The majority approach would allow a district court up to 60 days for the suppression motions, so long as there is one non-suppression motion decided at the same time. (The sixty days would be reduced only by whatever time it took to decide the non-suppression motion, which, in some cases, probably would be less than one day.) Thus, there would be no sanction for violating the 30-day period under (J) for the suppression motions. In addition, there would be an invitation to manipulate; the government could help insure against

speedy trial violations by filing other evidentiary motions after a motion to suppress is filed. And defendants will likely be chilled; they will think twice before filing any additional motions.

The "common sense" result reached by the panel might have more to commend it if there were not available perfectly adequate means, consistent with the statute, for a district court to obtain as much time as it reasonably needs to decide pretrial motions. It may take all the time it wants before having a hearing on a motion to suppress; it can wait after the hearing until all the filings are in; it can then take 30 days and, on the 30th day, it can announce that exceptional circumstances justify a further delay, 18 U.S.C. 3161(h)(8). If, at the end of all this time, there is pending a non-suppression motion, the court has 30 days to decide it—but it can announce a needed extension on or before the 30th day.

I therefore conclude that only time actually spent on the non-suppression motions in this case is excludable. This is not to say that I believe a court must make a showing that it was actually considering the motions on every one of the days it had them under advisement. *See* original panel opinion at 6-10. I merely believe that only the days actually under advisement are excludable.

On the record before us in this case, it is impossible to determine how much time was devoted to the non-suppression motions. The district court stated that it waited until it had decided the suppression motions before taking the non-suppression motions under advisement. The decision on the suppression motions was issued on December 23, however, two days *after* the order on the non-suppression motions. As does the majority, I assume that the court first decided the suppression motions, and then turned to the non-suppression motions while it put finishing touches on the lengthy opinion disposing of the suppression motions. But we do not know when the court completed de-

liberations on the suppression motions, or whether the court then took one hour or one day or five days to decide the non-suppression motions. I would therefore remand the case to that court asking it to specify how much time it spent on the non-suppression motions. If the non-suppression motions were under advisement for less than five days, the Act was violated.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1262

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES D. CARTER,
Defendant, Appellant.

No. 84-1263

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL F. MURRAY,
Defendant, Appellant.

Before
Campbell, *Chief Judge,*
Coffin and Breyer, *Circuit Judges*

MEMORANDUM AND ORDER
Entered October 31, 1986

In their petition for rehearing and for en banc consideration, petitioners argue that our decision is not faithful to the Supreme Court's *Henderson* opinion, making much of a sentence in which we say that read "literally" one part of *Henderson* might be thought to indicate that the non-suppression motions were under advisement as of May 27, 1983, when all necessary papers were filed. Petitioners

suggest that our use of the word "literally" is a concession that *Henderson* dictates a result different from the one we reached.

We have made no such concession. Petitioners read *Henderson* to state that where a judge cannot sensibly decide one motion unless he first resolves another one, that the former, unripe one is "under advisement" from the time the necessary papers have arrived. All three of us, however, believe that the *Henderson* Court did not pass upon that question, as it was never before it. As explained in the majority decision, language elsewhere in *Henderson* strongly suggests that, faced with that question, the Court would have acted as we did. The majority, therefore, believes for reasons we have fully set out, that *Henderson,* applied to the particular facts of this case, dictates the result we reached, not the one petitioners favor. It is elementary that precedents are read in factual context. The facts here involve a set of circumstances that were not present or decided in *Henderson.* It must be emphasized that *Henderson* did not involve review of this case; we are not dealing with a remand after Supreme Court review of our case, but rather a remand in circumstances where the Court cannot be expected to have given attention to the particular factual situation of the instant case. Accordingly we do not construe the Court's remand as a direction to reverse but rather as reflective of the Court's recognition that we did not have the benefit of *Henderson*'s guidance at the time of our initial decision, and that we should now focus on *Henderson,* which we have conscientiously done, since *Henderson* may (but also may not) require reversal. We would not have hesitated to reverse if the application of *Henderson* called for a reversal, but we do not believe it does. Our use of the word "literally" was meant to contrast what would have been a wooden and incorrect application of certain language read out of context with what we think to be the correct and proper application of that opinion. The present case presents a

unique and difficult set of facts which, for reasons we have tried to convey in our opinion, leads to the result described. While as Judge Coffin's dissent demonstrates, our solution is certainly not beyond all rational criticism, we think it is not vulnerable on the ground petitioners urge. Indeed, we think petitioners' reading of *Henderson* is incorrect and contrary to *Henderson* both in letter and spirit.

The petition for rehearing is denied.

By the Court,

/s/ FRANCIS P. SCLGLIANO
Clerk.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84-1263

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL F. MURRAY,
Defendant, *Appellant.*

JUDGMENT

Entered: October 7, 1986

The Supreme Court of the United States having vacated the judgment of this court and remanded the cause for further consideration in light of *Henderson v. United States,* 476 U.S. ___, (1986),

It is ordered that the judgment of the district court is affirmed.

By the Court:

/s/
FRANCIS P. SCIGILANO
Clerk

OPPOSITION

BRIEF

Nos. 86-995 and 86-1016

In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether evidence observed but not seized during a warrantless entry into a building should be suppressed if it would inevitably have been discovered during the subsequent search of the building pursuant to a valid search warrant.

2. Whether the court of appeals correctly computed the time excludable under 18 U.S.C. 3161(h)(1)(J) for the disposition of pretrial motions in determining whether the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*, was violated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-995

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1016

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 52a-61a)[1] is reported at

---

[1] "Pet. App." refers to the appendix to the petition filed by petitioner Murray in No. 86-995. "86-1016 Pet. App. " refers to the appendix to the petition filed by petitioner Carter.

803 F.2d 20. The order denying a petition for rehearing (Pet. App. 62a-64a) is not yet reported. The original opinion of the court of appeals (Pet. App. 1a-31a), as modified (Pet. App. 50a-51a), is reported at 771 F.2d 589. The orders of the district court (Pet. App. 32a-48a; 86-1016 Pet. App. 44a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 65a) was entered on October 7, 1986. A petition for rehearing was denied on October 31, 1986. The petition for a writ of certiorari in No. 86-995 was filed on December 17, 1986. The petition in No. 86-1016 was filed on December 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on one count of conspiracy to possess a quantity of marijuana in excess of 1000 pounds with intent to distribute it, in violation of 21 U.S.C. 841 and 846. Each was sentenced to four years' imprisonment and fined $15,000. The court of appeals affirmed. Following the decision in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), this Court vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Henderson*. Nos. 85-1105 and 85-1118 (May 27, 1986). On remand, the court of appeals again affirmed petitioners' convictions.

1. The evidence developed at a suppression hearing and at trial is summarized in the initial opinion

of the court of appeals (Pet. App. 10a-12a). The FBI learned from informants that, between early 1982 and March 1983, co-defendant John Rooney, Arthur Barrett, and others were involved in a large-scale marijuana importation and distribution network operating out of a garage in South Boston. Consequently, in July 1982 the agents commenced surveillance of the suspects' activities, verified their regular association, and learned from other informants that they maintained a warehouse somewhere in South Boston in which they stored marijuana.

On April 5 and 6, 1983, the agents observed petitioners and others engaged in a pattern of activity that included clandestine efforts to load, transport, and deliver material in a white Ford truck, a green camper, and a blue van. During the early afternoon of April 6, the agents stopped the green camper on the Massachusetts Turnpike and arrested the driver, co-defendant Christopher Moscatiello. One of the agents observed burlap-covered bales inside the camper. On examination pursuant to a search warrant, the bales were found to contain marijuana. Other agents followed the white Ford pickup truck driven by Rooney from the time it left the warehouse until it stopped in a driveway at a private residence. The agents arrested Rooney and searched the truck, finding approximately 60 bales of marijuana. While that search was taking place, other agents stopped the blue van and arrested petitioners. Pet. App. 10a-11a.

The agents then converged on the warehouse where the vans apparently had been loaded. There, they saw a man pacing back and forth in front of the building; the man appeared to be observing traffic as it passed. After the agents drove around the block,

however, the man disappeared. Shortly thereafter, other agents arrived on the scene. They tried to determine whether anyone was inside the building by banging on the door and announcing the presence of law enforcement officers. When those efforts proved unsuccessful, the agents made a warrantless forced entry of the building "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence" (Pet. App. 42a). The agents made a brief walkthrough of the premises, determined that no one was inside, and then departed and guarded the building from the outside. In the course of walking through the building, the agents detected a strong odor of marijuana and observed many burlap-wrapped bales, which they suspected contained marijuana. *Id.* at 11a-12a.

Following their departure, the agents obtained a warrant to search the building. In their application for the warrant, the agents did not mention the warrantless entry and did not make use of any information they had obtained as a result of that entry. Execution of the warrant resulted in the seizure of approximately 500 bales of marijuana, which were each marked with tapes bearing numbers. The agents also seized notebooks listing the customers whose names corresponded with the numbers on the bales. Pet. App. 12a.

2. Before trial, petitioners moved to suppress the marijuana seized from the warehouse. They alleged that the warrantless entry into the warehouse, during which the marijuana bales were seen, was unlawful and vitiated the subsequent seizure of the bales pursuant to the search warrant. The district court

denied the motion (Pet. App. 32a-48a), and the court of appeals affirmed (*id.* at 1a-31a). The court of appeals held that the warehouse search warrant was not invalidated by the failure of the application to mention the earlier warrantless entry of the building (*id.* at 26a-27a). The court also rejected petitioners' argument that the marijuana bales observed during that entry must be suppressed. The court found it unnecessary to resolve whether the warrantless entry was justified by exigent circumstances—specifically, the need to avert the possibility that evidence would be destroyed by persons who may have been inside. The court noted that the district court's failure to make findings on the question of exigency made it difficult to address that issue (*id.* at 24a).[2] Assuming arguendo that the warrantless entry was unlawful, the court reasoned that, because the bales of marijuana were in plain view, they would inevitably have been discovered as the result of the subsequent lawful warrant search. Under the principles of *Segura* v. *United States*, 468 U.S. 796 (1984), and *Nix* v. *Williams*, 467 U.S. 431 (1984), the court concluded therefore that there was not a sufficient nexus between the assumed illegality and the evidence in question to justify suppression (Pet. App. 24a-28a).

3. a. Petitioners and other co-defendants were indicted on April 20, 1983. On May 9, 1983, they filed various pretrial motions. Some of the motions sought suppression of the evidence seized; others sought other forms of relief such as severance, election of counts, and specification of the order of the government's proof. On October 17, 1983, the district court com-

---

[2] Petitioners incorrectly state (86-995 Pet. 8) that the court of appeals indicated that there were no exigent circumstances. The court did not resolve the issue.

pleted hearings on the motions to suppress and took them under advisement. The motions for severance and other forms of relief were denied on December 21, 1983; the motions to suppress were denied on December 23, 1983. Trial began one month later, on January 23, 1984. Pet. App. 5a-6a.

On the day the trial began, petitioners moved to dismiss the indictment on the ground that the Speedy Trial Act, 18 U.S.C. (& Supp. III) 3161 *et seq.*, had been violated. In connection with the motion, they conceded that 195 days were excludable under the Act; in its subsequent order, the district court noted that an additional eight days were excludable because of the pendency of a government motion to use charts at trial—a finding that is not challenged by petitioners. These exclusions yielded an uncontested total amount of excludable time of 203 days, which left only five days in excess of the 70-day maximum prescribed by the Act. Pet. App. 4a-9a.

b. The district court denied the motion to dismiss (86-1016 Pet. App. 44a-45a). The court noted that under 18 U.S.C. 3161(h)(1)(J) only 30 days of the period between the October 17 suppression hearing and the December 23 ruling could be excluded as attributable to consideration of the suppression motions. The court explained, however, that the other pending motions, some of which concerned the ordering of the presentation of the government's evidence, would have been mooted if a suppression order had been entered; hence, those motions were not taken under advisement until the suppression motions were resolved. Those motions, the court reasoned, were not subject to the 30-day limit of Section 3161(h)(1)(J) for consideration of motions, but were covered by the provisions of Section 3161(h)(1)(F), which

excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Under the latter provision, the trial court concluded that, even though the motion to suppress was under advisement for more than the 30-day period excludable under Section 3161(h)(1)(J), the additional period was not an unreasonable time "given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment * * * should support a finding of probable cause" (86-1016 Pet. App. 45a-46a). Because the rulings on the suppression motions could have been dispositive of the nonsuppression motions, the court stated that "it was reasonable to hold [those latter] motions until I had decided the motion to suppress" (*id.* at 45a). Consequently, the court held that the full period between the filing of the motions and their disposition, representing 35 additional days not conceded by petitioners, was properly excludable (*id.* at 46a).

c. The court of appeals affirmed this ruling also (Pet. App. 4a-10a). In its initial opinion, the court rejected petitioners' contention (not renewed in this Court) that the 30-day period between October 17, 1983, and November 16, 1983, could not be excluded under Section 3161(h)(1)(J) without a showing that the court was actually considering the motions on each one of those days. Then, addressing the period "through December 23, 1983, during which the * * * (non-suppression) motions were pending," the court held that the time was excludable under Section 3161(h)(1)(F) because it was reasonable for the district court to have withheld decision on those motions. Accordingly, the court of appeals concluded

that the total nonexcludable time amounted to only 45 days and that the Speedy Trial Act was not violated. Pet. App. 9a-10a.

d. Petitioners sought rehearing, noting that, according to the docket sheet and the district court's own statements, the nonsuppression motions were decided on December 21, 1983, rather than on December 23, 1983, as both the district court and the court of appeals apparently had assumed. Accordingly, they argued that it could not have been necessary for the district court to dispose of the suppression motions before ruling on the others. Therefore, petitioners argued, no portion of the period after the suppression hearing should have been excludable under Section 3161(h)(1)(F). The court of appeals amended its opinion "[f]or purposes of clarification," but otherwise denied the rehearing petition without opinion (Pet. App. 50a-51a). The amended opinion noted that the court was not holding "that more than 30 days can be excluded under section 3161(h)(1)(J) for deciding the suppression motions" or that the entire period following the suppression hearing was excludable. The amended opinion also omitted the conclusion (Pet. App. 51a) that the total nonexcludable time amounted to 45 days and substituted the conclusion that the total nonexcludable time "did not exceed 70 days" and that the Speedy Trial Act was not violated. *Ibid.*

e. Last Term, petitioners filed petitions in this Court claiming both that the 70-day limit of the Speedy Trial Act had been exceeded and that the bales of marijuana seized from the warehouse should have been suppressed (Nos. 85-1105 and 85-1118). On May 27, 1986, this Court granted the petitions, vacated the judgment of the court below, and remanded for further consideration in light of *Henderson* v. *United States*, No. 84-1744 (May 19, 1986).[3] *Henderson* construed 18 U.S.C. 3161(h)(1)(F), the pretrial motion provision of the Speedy Trial Act.

f. On remand, the court of appeals reexamined the speedy trial issue and again affirmed (Pet. App. 52a-61a). The court once again noted that all parties agreed that "the 30 days from October 17 (when the district court completed hearings on the suppression motions) to November 16, 1983, were excludable as being the 30 days provided in [Section 3161(h)(1)(J)] for motions that are 'actually under advisement by the court' " (Pet. App. 53a). The court further observed that, if at least five days following November 16 could be excluded from speedy trial calculations, the 70-day limit of the Act would not be exceeded (*ibid.*). The court then held that the requisite number of days could be excluded under subsection (J) as time during which the nonsuppression motions were "under advisement." The court reasoned that the nonsuppression motions were not in a position to be taken under advisement until the case-dispositive suppression motions were decided, which occurred sometime in mid-December. Even if the suppression motions should have been decided by November 16, 1983—30 days after the conclusion of the suppression hearing—the district court was "still entitled to further credit for up to 30 days additional time within which to decide the non-suppression motions, since these latter motions were not ripe for decision—*i.e.*, were not actually 'under advisement'—until the underlying suppression motions were resolved." Pet. App. 57a. In reaching this conclusion, the court of appeals relied on this Court's decision in *Henderson*, which permitted " 'an exclu-

[3] Justice Stevens voted to deny the petitions.

sion of 30 days from the time a motion is actually "under advisement" by the court'" (Pet. App. 58a (quoting *Henderson*, slip op. 8)). "Since, in fact, only five [of those 30] additional days were needed to comply with the Speedy Trial Act," the court of appeals found that the trial was timely (Pet. App. 58a).

Judge Coffin dissented (Pet. App. 58a-61a). In his view, only the days following November 16 during which the nonsuppression claims were actually being considered by the district court could be excluded from speedy trial computations under subsection (J). Because the record does not specifically disclose how much time the district court devoted to the nonsuppression motions after deciding the suppression motions, Judge Coffin would have remanded the case for the district court to specify how much time it devoted to those motions. Pet. App. 59a-61a. Judge Coffin did not take issue with the majority opinion in any other respect.

g. In a rehearing petition, petitioners charged that the court of appeals had not been faithful to this Court's decision in *Henderson*. 86-1016 Pet. App. 50a-61a. In an order denying the petition the court of appeals unanimously rejected petitioners' suggestion that this Court in *Henderson* had passed on the question that they presented (Pet. App. 63a). The court rejected the assertion that *Henderson* "state[s] that where a judge cannot sensibly decide one motion unless he first resolves another one, that the former, unripe one is 'under advisement' from the time the necessary papers have arrived" (*ibid.*). In the court's view, *Henderson* did not squarely address this question, but language in *Henderson* supported its finding of no speedy trial violation in this case (*id.* at 63a-64a).

ARGUMENT

1. Petitioners contend (86-995 Pet. 10-23) that the bales of marijuana seized from the warehouse pursuant to a lawfully obtained warrant should be suppressed because the investigating agents had seen the bales during a prior, warrantless protective sweep of the warehouse, which, petitioners allege, was not justified by exigent circumstances. Petitioners do not dispute that, at the time of the protective sweep, the agents already had probable cause to obtain a search warrant for the warehouse. Nor do they dispute that the subsequently obtained warrant was issued solely on the basis of information gathered by the agents before the warrantless entry. Indeed, the observation of the bales during the agents' initial entry contributed nothing to the agents' decision to search the warehouse. And, of course, the agents did not "seize" the marijuana until the untainted warrant was obtained.[4] In these circumstances, both

[4] As petitioners note (86-995 Pet. 14), the First Circuit, after deciding their case, adopted the unique and surprising theory that, when premises are secured, all evidence (and *only* the evidence) *observed* during a prior warrantless entry is thereby "seized." *United States* v. *Silvestri*, 787 F.2d 736, 739-740 (1986), petition for cert. pending, No. 86-678. Contra, *e.g.*, *United States* v. *Merriweather*, 777 F.2d 503, 506 (9th Cir. 1985), cert. denied, No. 85-6384 (Mar. 31, 1986). We disagree with that novel approach, which to our knowledge is supported by no other court of appeals, but whatever its merits it is of no help to petitioners. The sole import of this analysis by the court of appeals was that the court determined that it is the "inevitable discovery" doctrine rather than the cognate "independent source" doctrine that applies to cases involving evidence observed during an illegal prewarrant search (787 F.2d at 740). Since the court of appeals in this case applied the requirement that the lawful discovery of the pertinent evidence be "inevitable," its analysis is consistent

courts below properly refused to suppress the marijuana on the ground that the marijuana would inevitably have been discovered during the course of the warrant search.

a. Significantly, petitioners do not dispute that the marijuana would inevitably have been discovered pursuant to the warrant search. But they urge this Court not to apply the inevitable discovery doctrine, adopted in *Nix* v. *Williams*, 467 U.S. 431 (1984), to the facts of this case because to do so will encourage agents to disregard the Fourth Amendment by searching first and seeking a warrant later. That prediction, however, is baseless.

The inevitable discovery doctrine, like its close cousin the independent source doctrine (see *Segura* v. *United States*, 468 U.S. 796 (1984); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920)), presupposes that some arguably illegal police conduct has occurred. The doctrine does not reward or encourage such misconduct. But it recognizes that, if the prosecution can establish by a preponderance of the evidence "that the information ultimately or inevitably would have been discovered by lawful means * * * then the deterrence rationale has so little basis that the evidence should be received" (*Nix* v. *Williams*, 467 U.S. at 440 (footnote omitted)).

To suppress evidence in that setting, the Court stated, "would place courts in the position of with-

---

with *Silvestri*. See also *United States* v. *Salgado*, No. 85-3209 (7th Cir. Dec. 5, 1986), slip op. 9 (court need not resolve whether observation of evidence followed by securing of premises constitutes "seizure," since "whether there is an interim illegal seizure of evidence is irrelevant to the issue of exclusion, provided there is (as there is here) very great confidence that the evidence would have been obtained for use at trial even if there had not been that seizure").

holding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity" (467 U.S. at 445). The inevitable discovery doctrine is designed to avoid "put[ting] the police in a *worse* position" (*ibid.*) than if no illegality had occurred, and it applies only in cases where "the police would have obtained [the] evidence if no misconduct had taken place" (*id.* at 444). As the Court noted in *Nix* (*id.* at 445-446), if the discovery of evidence by lawful means is truly "inevitable," so that the doctrine should apply, the police have little to gain by seeking to discover it by unlawful means. Consequently, application of the inevitable discovery doctrine to the facts of this case will not induce the police to search first and obtain a warrant later, as petitioners suggest.

b. Contrary to petitioners' claim (86-995 Pet. 10-11), there is no tension between the decision of the court below and this Court's decision in *Segura* v. *United States*, *supra*. Petitioners suggest that the decision below is inconsistent with *Segura* because the Court there noted (468 U.S. at 804) that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion."[5] But this statement in *Segura* is quite unexceptional in its context and has nothing to do with the question presented here. First, the evidence in question here was not *obtained* as a result of an unconstitutional search; it was obtained by means

---

[5] The court of appeals quoted this passage from *Segura* and indicated that "[a]rguably" it "hinted at" a result different from the one that the court ultimately reached (Pet. App. 28a). Petitioners seriously overstate their claim that the court of appeals indicated that it was departing from *Segura* (86-995 Pet. 8, 10).

of a valid search warrant. The question is whether it is significant that the evidence had been *observed* earlier during an unlawful entry. Moreover, the "inevitable discovery" doctrine does not come into play unless the evidence in question is "'*in some sense* the product of illegal government activity'" (*Nix*, 467 U.S. at 444 (quoting, and adding emphasis to, *United States* v. *Crews*, 445 U.S. 463, 471 (1980))); the doctrine establishes that such evidence should not be excluded if it would inevitably have been discovered through lawful means. Hence, for petitioners to assert that the marijuana is subject to exclusion under long-established Fourth Amendment principles because it was initially discovered in the course of an illegal search (see 86-995 Pet. 22) is simply to pose the question presented in this case—whether the bales are nonetheless admissible under the inevitable discovery doctrine—not to answer it.[6]

[6] The misdirection of petitioners' argument is highlighted by their erroneous reliance on the government's brief in *Segura*. As petitioners note (86-995 Pet. 11-12 n.10), the government stated that "evidence discovered in the course of an illegal search ordinarily should be excluded." U.S. Br. at 13, *Segura* v. *United States*, 468 U.S. 796 (1984). But that general statement is subject to qualification, inter alia, by the inevitable discovery and independent source doctrines. The government explicitly stated in its brief (at 36 n.21) that, if the Court were to adopt the inevitable discovery doctrine in *Nix*, it would be incorrect to suppress evidence seen during a warrantless security check that would inevitably have been discovered anyway during the later execution of a search warrant. And the Court specifically reserved this issue in *Segura* (468 U.S. at 802-803 n.4). Thus, petitioners' assertion that their position is supported by the government's brief in *Segura*, like their assertion that it is supported by the Court's opinion in that case, is faulty because it ignores the inevitable discovery and independent source doctrines, which are at the heart of the question presented here.

c. Petitioners claim that the decision below conflicts with the decisions of numerous courts of appeals and the highest courts of several states.[7] There is, however, no true conflict between the decision below and a binding decision of any other federal court of appeals or the highest court of any jurisdiction. In the absence of any such conflict, further review is not warranted.

(i) The majority of the cases on which petitioners rely predate *Nix* v. *Williams*, 467 U.S. 431 (1984). Most of the pre-*Nix* cases are distinguishable from the present case, but a few, if still adhered to, would not be.[8] *Nix*, however, establishes a number of im-

[7] Petitioners also claim (86-995 Pet. 18-19 & nn.25-27) that the decision below conflicts with the decisions of intermediate appellate courts in Florida, Idaho, and Maryland. See also *id.* at 17 n.18 (discussing claimed conflict with decision of intermediate appellate court in Colorado); *id.* at 16 n.16 (discussing claimed conflict with decision rendered by intermediate appellate court in Alaska, but mistakenly cited as decision of highest court of Alaska). We disagree with that claim, but we do not pause to distinguish these cases, since a conflict between a federal court of appeals and a state court not of last resort would not in any event be a sufficient basis for a grant of certiorari.

[8] Petitioners' best pre-*Nix* cases are *United States* v. *Segura*, 663 F.2d 411, 417 (2d Cir. 1981), opinion after remand, 697 F.2d 300 (1982), aff'd on other grounds, 468 U.S. 796 (1984), and *People* v. *Barndt*, 199 Colo. 51, 604 P.2d 1173 (1980) (en banc). If the courts that decided those cases were now to adhere to them, those decisions could fairly be said to be in direct conflict with the decision below. At the other extreme, petitioners claim a conflict with such pre-*Nix* cases as *United States* v. *Congote*, 656 F.2d 971 (5th Cir. 1981), which does not even remotely touch on application of the inevitable discovery or independent source doctrines. Similarly, *United States* v. *Romero*, 692 F.2d 699 (10th Cir. 1982), and *United*

portant principles that make it highly questionable whether the courts that decided those cases will adhere to them.[9]

Nix was the first case in which this Court endorsed the "inevitable discovery" exception to the exclusionary rule.[10] In so doing, *Nix* "reaffirmed" (86-995 Pet. 16) the law followed in most of the lower courts, but that is not all that *Nix* did.

Nix squarely rejected a rule that would require a showing of police "good faith" in order for the inevitable discovery rule to apply (467 U.S. at 445-446) and thus undermined many of the cases on which petitioners rely.[11] The *Nix* majority also indicated that the exclusionary sanction is inappropriate when it "would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired" (467 U.S. at 445).[12] The Court explained that in inevitable discovery situations invocation of that sanction is unnecessary as a deterrent to unlawful police behavior (*id.* at 445-446):

States v. *Alvarez-Porras*, 643 F.2d 54 (2d Cir.), cert. denied, 454 U.S. 839 (1981), on which petitioners rely, *uphold* the admission of certain evidence under the inevitable discovery doctrine and therefore certainly contain no holding in conflict with the decision below.

[9] This is not to "beg the question presented by this case" (86-995 Pet. 16 n.15); rather, it is to say that the vitality of those decisions is in doubt in the aftermath of *Nix*, and the question presented may not have to be resolved by this Court if those decisions are reexamined and revised in light of *Nix*. If any court adheres to a pre-*Nix* decision that is inconsistent with the decision in the present case—something that has not happened to date—this Court will have ample opportunity to resolve the real conflict that will then be presented.

[10] That fact alone is sufficient to eliminate the alleged conflict between the decision below and the pre-*Nix* law in the Sixth Circuit. The Sixth Circuit decision said to be in conflict with the decision below is *United States* v. *Griffin*, 502 F.2d 959, cert. denied, 419 U.S. 1050 (1974), in which the court held that there is no inevitable discovery doctrine at all. 502 F.2d at 961 ("The assertion by police * * * that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."); see also *United States* v. *Apker*, 705 F.2d 293, 306 (8th Cir. 1983) ("Only the Sixth Circuit has explicitly rejected the inevitable discovery exception. *United States v. Griffin* * * *."), cert. denied, 465 U.S. 1005 (1984); *State* v. *Williams*, 285 N.W.2d 248, 257-258 (Iowa 1979) (similar description of *Griffin*), cert. denied, 446 U.S. 921 (1980).

---

[11] See, *e.g.*, *State* v. *Williams*, 285 N.W.2d 248, 258 (Iowa 1979), cert. denied, 446 U.S. 921 (1980); *State* v. *Holler*, 459 A.2d 1143, 1147 (N.H. 1983) (dictum) ("good faith on the part of the police is inherent in the inevitable discovery exception"). The language from these cases that petitioners quote (86-995 Pet. 17 n.20, 19 n.28) comes in the context of explication of the "good faith" requirement. See also *State* v. *Hansen*, 295 Or. 78, 97, 664 P.2d 1095, 1105-1106 (1983) (en banc) (in case not involving any "inevitable discovery" question, basing suppression on "purpose" of police officers in effecting warrantless entry). When squarely faced with an "inevitable discovery" question, the Supreme Court of Oregon has followed the *Nix* approach, not the *Hansen* approach. See *State* v. *Miller*, 300 Or. 203, 225-229, 709 P.2d 225, 242-243 (1985), cert. denied, No. 85-6164 (Apr. 28, 1986).

[12] This important clarification of exclusionary rule doctrine, which is utterly inconsistent with petitioners' theory, has been recognized by the lower courts. See, *e.g.*, *United States* v. *Hernandez-Cano*, No. 86-8288 (11th Cir. Jan. 23, 1987), slip op. 1254, 1255; *Hamilton* v. *Nix*, No. 84-2089 (8th Cir. Jan. 20, 1987) (en banc), slip op. 10; *United States* v. *Salgado*, No. 85-3029 (7th Cir. Dec. 5, 1986), slip op. 10.

> when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. * * * In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

Virtually every pre-*Nix* case on which petitioners rely, to the extent it is apposite at all, is based on the contrary theory that the exclusionary rule is an appropriate deterrent to unlawful police behavior in inevitable discovery situations, even when it puts police in a worse situation than they would have been in if no unlawful activity had taken place.[13] Whether

[13] See, *e.g.*, *United States* v. *Segura*, 663 F.2d at 417; *People* v. *Barndt*, 199 Colo. at 56, 604 P.2d at 1176; *People* v. *Cook*, 22 Cal. 3d 67, 98-99, 583 P.2d 130, 148-149, 148 Cal. Rptr. 605, 623-624 (1978); *Commonwealth* v. *Benoit*, 382 Mass. 210, 218-219, 415 N.E.2d 818, 823 (1981). To the extent that courts in these jurisdictions have decided similar issues after *Nix*, they have looked primarily to *Nix* rather than to their own pre-*Nix* cases for guidance. See *People* v. *Steeg*, 175 Cal. App. 3d 665, 688, 220 Cal. Rptr. 904, 917-918 (1985) (after *Nix*, accepting theory that evidence initially discovered by illegal warrantless search may be admitted under inevitable discovery doctrine), review granted, 715 P.2d 564, 224 Cal. Rptr. 605 (1986); *Commonwealth* v. *Frodyma*, 393 Mass. 438, 471 N.E.2d 1298 (1984) (following *Nix*). A lower court in Colorado has rendered a post-*Nix* decision that, although distinguishable from the decision below, appears to be in some

any of those decisions survives *Nix* is an open question. The pre-*Nix* cases on which petitioners rely therefore do not provide a sufficient basis for this Court to grant certiorari.

(ii) Petitioners assert, however, that there is a conflict between the decision below and several post-*Nix* cases. That claim is incorrect. Indeed, the three circuits that have squarely confronted the question since *Nix* have uniformly refused to suppress evidence observed during an illegal entry but later seized pursuant to an untainted warrant whose issuance was inevitable. See *United States* v. *Salgado*, No. 85-3209 (7th Cir. Dec. 5, 1986); *United States* v. *Silvestri*, 787 F.2d 736 (1st Cir. 1986), petition for cert. pending, No. 86-678; *United States* v. *Merriweather*, 777 F.2d 503 (9th Cir. 1985), cert. denied, No. 85-6384 (Mar. 31, 1986).

Two of the federal cases on which petitioners rely simply do not resolve (or imply any resolution of) questions under the inevitable discovery doctrine or the independent source doctrine.[14] As petitioners con-

tension both with the decision below and with *Nix* itself, but the Supreme Court of Colorado granted the State's petition for certiorari on April 7, 1986. *People* v. *Schoondermark*, 717 P.2d 504 (Colo. Ct. App. 1985). It would thus be particularly inappropriate for this Court to grant certiorari at this time to review a claimed conflict between the decision below and the interpretation of the Fourth Amendment by the Supreme Court of Colorado.

[14] *United States* v. *Dart*, 747 F.2d 263 (4th Cir. 1984) (suppressing evidence seized pursuant to warrant that was based on information gathered in earlier illegal entry); *United States* v. *Williams*, 737 F.2d 735, 740 (8th Cir. 1984) (expressly declining to decide whether admission of items seen during initial, warrantless entry was error, because it was harmless error if error at all).

cede, the language that they quote from two post-*Nix* decisions of state courts of last resort is dictum,[15] as is the footnote that they quote from *United States* v. *Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986).[16] In *United States* v. *Owens*, 782 F.2d 146 (10th Cir. 1986), the government never obtained a warrant, and the court's decision does not reflect any government argument that discovery pursuant to a warrant was inevitable, let alone any holding on

---

[15] See *State* v. *Badgett*, 200 Conn. 412, 433, 512 A.2d 160, 171-172 (1986), cert. denied, No. 86-376 (Nov. 3, 1986); *State* v. *Sugar*, 100 N.J. 214, 240 n.3, 495 A.2d 90, 104 n.3 (1985). In both cases, the court left open for further proceedings on remand the possibility that the evidence at issue *could* be admitted under the inevitable discovery doctrine. In addition, the cryptic footnote in *Sugar* that petitioners cite has not been taken by the New Jersey courts to mean that evidence discovered during an illegal warrantless search cannot be admitted when it would inevitably have been discovered during a later warrant-authorized search. See *State* v. *DeLane*, 207 N.J. Super. 45, 51-53, 503 A.2d 903, 905-907 (App. Div. 1986) (upholding admission of evidence seized pursuant to warrant notwithstanding prior warrantless entry).

[16] The *Echegoyen* court held that no unlawful entry had occurred in that case, so any suggestion about what the court might have done if there had been an unlawful entry is dictum that does not bind any subsequent Ninth Circuit panel. Ninth Circuit panels *are*, however, bound by the holdings of *United States* v. *Merriweather*, *supra*, and *United States* v. *Andrade*, 784 F.2d 1431 (9th Cir. 1986), that evidence may be admitted under the inevitable discovery doctrine despite earlier illegal warrantless searches. Petitioners' reliance (86-995 Pet. 15) on Judge Reinhardt's concurring opinion in *Andrade* is altogether misplaced, since Judge Reinhardt spoke only for himself and in any event did nothing more than criticize this Court's decisions.

that subject.[17] Likewise, in *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), the government never obtained a warrant, and its "inevitable discovery" argument, in stark contrast to this case, was based on the purely hypothetical proposition that the government would inevitably have obtained a warrant if it had not engaged in an illegal warrantless search. Finally, in *United States* v. *Satterfield*, 743 F.2d 827 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985), unlike this case, the government actually conducted a full-blown warrantless search (rather than a protective sweep) during which it physically seized the evidence in issue. The government subsequently went through the ritual of obtaining a warrant (see 743 F.2d at 845), but even then it appears that the warrant was never executed.[18]

---

[17] The government's argument in *Owens* was that a motel maid would have found the evidence and reported it to the police (782 F.2d at 152-153). The court simply rejected, as a factual matter, the government's "highly speculative assumption of 'inevitability'" (*id.* at 153). Contrary to the position taken by petitioner Murray in his amicus brief in No. 86-678, *Silvestri* v. *United States*, at 7, any language in *Owens* about the need for a preexisting, independent police investigation is not the "holding" of the case.

[18] There is, to be sure, language in *Cherry* and *Satterfield* that purports to go far beyond the facts of those cases and set a per se rule that evidence discovered during an unlawful warrantless entry can never be admitted on the basis of a later, warrant-authorized search and seizure unless the police can demonstrate that they were already pursuing an independent, lawful means of discovery of the evidence when the illegal conduct occurred. See also *United States* v. *Hernandez-Cano*, No. 86-8288 (11th Cir. Jan. 23, 1987), slip op. 1255 (summarizing and distinguishing *Satterfield*). But, as the First Circuit explained in *United States* v. *Silvestri*, 787 F.2d at 745-746, the inflexible requirement suggested in *Cherry* and

In sum, although petitioners vigorously seek to portray the federal courts of appeals and state courts of last resort as being in disarray on the question presented, they are not. Accordingly, further review of the well-reasoned opinion of the court below on the exclusionary rule issue is unwarranted.

2. The court of appeals correctly found that petitioners' rights under the Speedy Trial Act had not been violated. The Speedy Trial Act requires that trial begin within 70 days of indictment or the defendant's first court appearance, whichever last oc-

---

Satterfield stems from concerns about whether discovery was truly inevitable—concerns justified by the facts of *Cherry*, in which the police never obtained a warrant, and *Satterfield*, in which all indications were that the warrant was obtained as an afterthought in an attempt to validate the preceding warrantless search and seizure. In the present case, by contrast, the district court found as a matter of fact that the agents made nothing but a brief security sweep of the warehouse and then secured and guarded the premises from the outside while awaiting a warrant (Pet. App. 42a). There is no reason in this case, as there was in *Cherry* and *Satterfield*, to doubt the inevitability that the agents would obtain a warrant. It remains to be seen whether the *Cherry* and *Satterfield* courts would apply the language of those cases to a case like this one (or like *Silvestri*), which presents much more compelling facts for applying the inevitable discovery rule. Indeed, the *Cherry* court reaffirmed rather than overruled a prior case in which it had upheld the admission of evidence, even though the per se rule was not met. 759 F.2d at 1205 (citing *United States* v. *Miller*, 666 F.2d 991 (5th Cir.), cert. denied, 456 U.S. 964 (1982)); see also *United States* v. *Fitzharris*, 633 F.2d 416 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981). In a context other than warrantless searches, the Fifth Circuit has correctly recognized that "whether [evidence] would inevitably have been found is a question of fact, pure and simple." *Wicker* v. *McCotter*, 798 F.2d 155, 158 (1986).

curs. 18 U.S.C. 3161(c)(2). That 70-day period, however, is expanded by periods of excludable delay. 18 U.S.C. (& Supp. III) 3161(h)(1)-(9). Section 3161(h)(1)(J) excludes a maximum of 30 days during which a pretrial motion is "under advisement."

In this case, petitioners and their co-defendants filed two groups of motions. The first group consisted of various suppression claims, which, if successful, would have necessitated dismissal of some or all of the charges. The second group can be classified as nondispositive motions—motions seeking such relief as severance, election of counts, and specification of the order of the government's proof. Petitioners contend that the 30-day "under advisement" period for these nondispositive motions began to run once all the papers on the motions were filed.

The court of appeals disagreed and held that the 30-day period did not begin to run until the district court had decided—or until it should have decided—the suppression claims. The court reasoned that, until the suppression claims were decided, the district court did not know whether the case would actually proceed to trial. Accordingly, up to that point the nondispositive motions were not yet ripe. Consequently, it would have been inefficient and imprudent for the district court to have taken the nondispositive motions under advisement until it had decided to deny the suppression claims.[19]

---

[19] The written opinion of the district court denying the suppression motions was actually issued two days *after* its ruling on the nondispositive motions. But, as the record clearly shows, the district court had decided to deny the suppression motions at an earlier date, and then turned its attention to the nondispositive motions. See Pet. App. 54a n.1; 86-1016 Pet. App. 45a.

Petitioners point to nothing in the language of the Speedy Trial Act contradicting the court's application of the Act to the facts of this case. Instead, they argue that the decision of the court of appeals conflicts with *Henderson* v. *United States*, No. 84-1744 (May 19, 1986). It does not.

In *Henderson*, this Court considered how much time can be excluded for pretrial motions under Section 3161(h)(1)(F), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." The Court held that the subsection (F) exclusion cannot extend beyond the point at which the motion is taken "under advisement." Any excludable delay pertaining to the motion from that point forward is governed by subsection (J), the "under advisement" exclusion. Slip op. 7-8.

Nothing in the *Henderson* opinion, however, purports to restrict the date on which a motion must be taken "under advisement." *Henderson* merely holds that, for motions decided on the papers without a hearing, the subsection (F) exclusion will normally end when all of the papers pertaining to the motion are filed with the court. Slip op. 7. But this construction of subsection (F) does not prevent a court from postponing consideration of a motion until some later event occurs, such as the decision of a case-dispositive motion.[20] At that point, the 30-day sub-

[20] No argument was made in *Henderson* that any particular event justified postponing consideration of the motions at issue. In particular, there was no argument in *Henderson* that the trial court had postponed, or was entitled to postpone, consideration of nondispositive motions until it had disposed of case-dispositive motions. As the court of appeals panel unanimously agreed, "the *Henderson* Court did not pass upon that question, as it was never before it" (Pet. App. 63a).

section (J) exclusion begins. In short, *Henderson* establishes the ending point for the subsection (F) exclusion; it does not fix a starting point for the subsection (J) exclusion other than the date on which the court actually takes the motion under advisement, which in this case was not until the suppression motions had been decided.

As petitioners must acknowledge, there is at present no conflict among the circuits on this speedy trial issue.[21] Petitioners nevertheless predict that the issue will arise in most criminal cases. If that prediction is correct, further explication of the issue from the circuits will be forthcoming. If a conflict develops, it may some day warrant resolution. At this time, however, there is no reason to review further the sensible construction accorded to subsection (J) by the court below.[22]

[21] Although there is no other case precisely on point, the courts have given a flexible construction to the "under advisement" exclusion when multiple motions are pending. See, *e.g.*, *United States* v. *Schuster*, 777 F.2d 264, 268 (5th Cir. 1985); *United States* v. *Latham*, 754 F.2d 747, 753 (7th Cir. 1985); *United States* v. *Tibboel*, 753 F.2d 608, 611-612 (7th Cir. 1985).

[22] As we have noted, the panel was not divided on the legal issue raised by the petitions. The one question on which the panel was divided—whether the record was or was not sufficient to support exclusion of five of the available 30 days for decision of the nonsuppression motions—is entirely fact-bound and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

FEBRUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40218

REPLY BRIEF

No. 86-995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

RICHARD A. GARGIULO
GARGIULO & MCMENIMEN
One Court Street
Boston, MA 02108
(617) 742-3833

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

PETITIONER'S REPLY BRIEF

1. The Fourth Amendment question presented by this case is a recurring one and it is important. The number of recent decisions cited by both sides demonstrates as much. As the government sees it, however, the many federal and state cases identified in the Petition do not present a "true conflict" between the decision below and the "binding" decision of any federal court of appeals or the highest court of any state. Brief in Opp., at p.15. It is not clear whether the government means that the cases we have cited are not "binding" or that they are not accurately portrayed in the Petition. In either event the government is mistaken.

Our Petition, for example, discusses *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); and *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985). Both courts held in the clearest possible terms that the inevitable discovery rule does not apply unless, at the time of the illegal search, the officers were in the process of obtaining a warrant. Had this case arisen in the Fifth or Eleventh Circuits, the evidence would have been suppressed. The officers here were not seeking a warrant when they broke into the warehouse without one. Our Petition also discusses *United States v. Owens*, 782 F.2d 146 (10th Cir. 1986), which held that when evidence has been discovered during an illegal search, the inevitable discovery rule cannot be invoked unless the police were lawfully pursuing an independent line of investigation that inevitably would have uncovered the evidence. In this case, the only investigation was the one that led to the unlawful search. Even the First Circuit acknowledges the conflict between *Sat-*

terfield, Cherry and *Owens* and the decision below.[1] The government may disagree with those decisions, but it cannot fairly claim they mean something other than what the opinions say. A court's stated and, in its view, necessary basis for decision does not cease to be its holding merely because the government thinks the case should have or could have been decided on some other basis. Compare Brief in Opp., at pp.21-22 n.18.

As the Petition also discusses (at pp.12-16), *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974);[2] and *United States v. Sequra*, 663 F.2d 411 (2d Cir. 1981), *opinion after remand*, 697 F.2d 300 (1982), *aff'd*, 468 U.S. 796 (1984), are in direct conflict with the decision below.[3] It is no answer to say, as the government does, that those

---

[1] See *United States v. Silvestri*, 787 F.2d 736, 742-46 (1st Cir. 1986), petition for cert. pending, No. 86-678 (rejecting what the court called the "ongoing" test adopted in *Satterfield, Cherry* and *Owens*).

[2] The government misstates the holding in *Griffin*, claiming the Sixth Circuit "held that there is no inevitable discovery doctrine at all" (Brief in Opp., at p. 16 n.10). The court said no such thing. It simply rejected the government's inevitable discovery theory in the search-illegally-first-obtain-the-warrant later context and it did so for reasons that fully apply today—namely that "[a]ny other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." 502 F.2d at 961. Accord, *e.g., Satterfield*, 743 F.2d at 845-46; *Cherry*, 759 F.2d at 1205 (relying upon *Griffin*).

[3] *Griffin, Sequra, Satterfield, Cherry* and *Owens* also conflict with the First Circuit's later decision in *Silvestri*, with *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1497 (1986); and with the recent decision in *United States v. Salgado*, No. 85-3209, decided December 5, 1986 (7th Cir.), relying on *Silvestri*.

decisions are not good law because they antedated *Nix v. Williams*, 467 U.S. 431 (1984). The government assumes that *Nix* should lead to a different result, which is the issue in this case.

Our Petition (at pp.22-23) discusses why *Nix* is not controlling here. The Eleventh Circuit in *Satterfield* (743 F.2d at 846) and the Fifth Circuit in *Cherry* (759 F.2d at 1204) recognized that *Nix* did not attempt to define the contours of the inevitable discovery rule. Moreover, *Nix* arose in the context of a Sixth Amendment violation; the Court obviously did not consider whether or how such a rule should apply under the Fourth Amendment when there has been an illegal search followed by a warrant-authorized search; and the Court's discussion of inevitable discovery addressed only the subject of derivative evidence, not the direct product of illegal police activity, which is what this case involves. See our Petition, at pp. 22-23.[4]

2. It is not only the federal courts of appeals and the state courts[5] that are in disarray about the issue

---

[4] The Court in *Nix* introduced its discussion of inevitable discovery with the statement "By contrast, derivative evidence analysis . . . ." 467 U.S. at 443. Here the government admits that the evidence illegally discovered in the warehouse is not derivative evidence but primary evidence. See Brief in Opp., at p. 6 n.6, and our Petition, at p. 11 n.10.

[5] What we have said about the federal cases applies also to the state cases discussed in our Petition (at pp. 16-20). The government seems to suggest that *Commonwealth v. Benoit*, 382 Mass. 210, 218-19, 415 N.E.2d 818, 823 (1981), is no longer good law in light of *Commonwealth v. Frodyma*, 393 Mass. 438, 471 N.E.2d 1298 (1984). Brief in Opp., at p. 18 n.13. That is not true. The *Frodyma* court cited and relied upon *Benoit*. See

here. It is the federal government as well. The government's treatment of *Satterfield* proves as much.

When this case was before the Court last Term, the government tried to squeeze it into *Satterfield's* holding by claiming that the illegal search here "was simply an early stage of a procedure designed to culminate in a warrant search"[6]—in other words, that it was part of an ongoing process to obtain a warrant. Apart from the absence of anything in the record to support such a notion, the government's argument involved the incredible proposition that one may violate the Fourth Amendment in order to comply with it. This time around the government has abandoned that position.[7]

---

393 Mass. at ___; 471 N.E.2d at 1300. Moreover, *Frodyma* was not an inevitable discovery case; it was decided on traditional independent source analysis and cited *Nix* only for its quotation of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). *Id.*

The other state case cited by the government (Brief in Opp., at p. 18 n.13), which was decided by an intermediate California appellate court (*People v. Steeg*, 175 Cal.App.3d 665, 220 Cal. Rptr. 904 (1985)), does not even cite the California Supreme Court's decision in *People v. Cook*, 148 Cal. Rptr. 605, 583 P.2d 130 (1978) (*en banc*), let alone purport to overrule it, which it could not do in any event. See our Petition, at pp. 16 n.17, 19-20.

[6] Brief in Opp., Nos. 85-1105, 85-1118, 85-1120, at p. 16.

[7] The government has argued other, purportedly critical distinctions of *Satterfield* that have turned out to be good for that day only. In response to the Petition in *Silvestri* (No. 86-678), the government said it was critical that unlike *Satterfield*, the police in *Silvestri* "had already decided to obtain a warrant when the illegal entry occurred . . . ." Brief in Opp., No. 86-678, at p. 8. We addressed the argument in our *Amicus* Brief in *Silvestri*,

Now the government contends that this case and *Satterfield* are different because here there were two searches, the first illegal and the second pursuant to a warrant, while *Satterfield* involved only one search (the illegal one).[8] Yet the government took precisely the opposite position last Term, telling the Court that the instant "case is quite different . . . [because] it does not involve two separate searches for evidence like *Satterfield*. . . ."[9] In the lower courts the government has taken still another tack, arguing that the inevitable discovery rule applies regardless whether there is a later search pursuant to warrant or not.[10] These confusing and contradictory positions show, above all else, that the government is unable to devise any principled way to reconcile the numerous decisions on this Fourth Amendment issue because there is none.

---

at pp. 5-6 n.4. The government has now abandoned it and for good reason: it does not apply in light of the facts of this case and, in any event, leads to the untenable result that, in order to ensure admissibility, the police must first announce among themselves or formulate in their minds a decision to seek a warrant and only then break down the door and conduct their illegal search without one.

[8] Brief in Opp., Nos. 86-995, 86-1016, at p. 21 ("it appears that the warrant [in *Satterfield*] was never executed.") One cannot tell how the government has gleaned this information. The opinion in *Satterfield* does not mention whether the warrant was executed; under the *Satterfield* holding it did not matter.

[9] Brief in Opp., Nos. 85-1105, 85-1118, 85-1120, at p. 16.

[10] See *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("The government also asserts that, even if the initial entry was unlawful, the evidence seized should not be suppressed because a search warrant would have inevitably been issued in this case").

The government's other quiddities are just as baseless. This case supposedly differs from *Satterfield* because here there was only a "brief" illegal search[11] while in *Satterfield* there was a "full-blown warrantless search." The facts are otherwise. The illegal search in *Satterfield* was itself brief: it took only ten minutes (787 F.2d at 843). The illegal search here was also brief because the agents quickly found what they were looking for. In *Satterfield*, three officers illegally entered the premises (787 F.2d at 843); in this case, at least ten officers illegally entered the premises (Pretrial Tr. 3-44). In *Satterfield* the officers removed cushions from a sofa to find the evidence, a shotgun (787 F.2d at 843); in this case, the officers combed the warehouse, searching under trucks and inside the vehicles that were there (Pretrial Tr. 3-45, 6-15). If *Satterfield* involved a "full-blown warrantless search" this case involved nothing less. At all events, the government never explains why any of this matters. The decision in *Satterfield* would have been the same regardless whether the shotgun was discovered under the cushions of the sofa or lying on top; the decision here would have been the same regardless whether the marijuana was discovered in plain view or behind the door of the trucks.

For reasons that are not apparent, the government also attaches great significance to the intent of the

---

[11] The government employs various descriptions of what occurred at the warehouse: a "warrantless security check," a "protective sweep," a "brief security sweep." Brief in Opp., at pp. 14 n.6, 21, 22 n. 18. All of these are euphemisms for a search in violation of the Fourth Amendment.

officers who illegally entered the warehouse,[12] implying that they were not looking for evidence whereas the officers in *Satterfield* were.[13] The government cites nothing to support its contention and the facts of this case are otherwise. The officer who wielded the tire iron on the warehouse door testified that in entering he hoped to find marijuana and documents, which he did (Pretrial Tr.6-21–6-23) (Garibotto).

The government also thinks it important that in *Satterfield* the officers seized the shotgun during their illegal entry while the agents here supposedly "seized" the evidence, not during their unlawful search, but when the warrant issued seven hours later. Brief in Opp., at p. 11 & n.4. Not even the First Circuit agrees with that proposition. *Silvestri* held that a "seizure" occurs when the government asserts control over the objects it illegally discovers, not later when it executes the warrant for the same items. 787 F.2d at 740. This is not, as the government claims, a "unique and novel theory." Brief in Opp., Nos. 86-995, 86-1118, at p. 11 n.4. Whenever the government meaningfully interferes with a person's possessory interests in property it has "seized" that property. See, *e.g.*, *United States v. Karo*, 468 U.S. 705, 712-13 (1984); *United States v. Jacobsen*, 466 U.S. 109, 120-21, 124-25 (1984); *Segura v. United States*, 468 U.S. 796, 822 (1984) (Justice Stevens, dissenting, joined by Justices Brennan, Marshall and Blackmun).[14] In any

---

[12] The government's purported distinction appears to contradict *Nix*, which heid that the officer's intent is irrelevant with respect to the inevitable discovery rule. 467 U.S. at 445-46.

[13] Brief in Opp., at pp. 21, and p. 22 n.18.

[14] The government cites, as contrary authority, *United States*

event, it is only the government that attaches any significance to the matter. None of the "search-illegally-first-obtain-the-warrant-later" cases turn on the point.

3. The government tells the Court: "Significantly, petitioners do not dispute that the marijuana would inevitably have been discovered pursuant to the warrant search." Brief in Opp., at p. 12. There is nothing significant about this at all. Whenever agents illegally uncover evidence and only then get a warrant to search for what they have already discovered, it is of course "inevitable" they will find it. Misreading the portion of *Nix* which dealt with derivative evidence, the government also broadly contends that the police should not be put in a worse position because of their illegal behavior. Brief in Opp., at pp. 17-18. Grant this argument all it can prove and what is the conclusion?—that there no longer is an exclusionary rule to deter police from entering premises without a magistrate's authorization so long as they had probable cause and could have obtained a warrant. That is the consequence of the decision below and that is the result so many other courts have found intolerable under the Fourth Amendment. The fatal flaw in the government's presentation is its complete disregard of the fundamental principle that a warrant must be obtained *before* the search takes place, not afterwards.

v. Merriweather, 777 F.2d 503, 506 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1497 (1986). But *Merriweather* did not discuss whether a seizure occurred upon the illegal entry in that case and the court did not hold that a seizure took place only during the later "search" pursuant to a warrant. Instead, the court merely said that what occurred during the illegality was not an "unreasonable" seizure of the evidence found on the premises. 777 F.2d at 506.

There is one thing inevitable here: if the government has its way, that principle embodied in the Fourth Amendment and endorsed time and again by this Court[15] will, as numerous courts have recognized, be destroyed.[16]

CONCLUSION

For the foregoing reasons and the reasons stated in our Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Dated: February 27, 1987

[15] See, *e.g.*, cases cited in 1 W. LaFave, *Search and Seizure* § 3.1(b), at pp. 548-49 (2d ed. 1987).

[16] In recent years the "search-illegally-first-obtain-the-warrant-later" pattern has begun to appear so frequently and has generated so many federal and state appellate decisions because it is only in recent years that some courts have begun to allow such illegally-discovered evidence to be admitted on an inevitable discovery theory. See our discussion of *People v. Cook*, *supra*, in the Petition, at pp.19-20.

JOINT

APPENDIX

Nos. 86-995 and 86-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

JAMES D. CARTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
EVAN MILLER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Counsel for Petitioners

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 17, 1986
CERTIORARI GRANTED MARCH 9, 1987

INDEX

The following opinions and judgments have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari for Michael F. Murray:

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RELEVANT DOCKET ENTRIES

CR-83-00102-01 CR-83-00102-01

US v CARTER, ET AL
As of 04/17/84 at 11:27 AM

Judge: JUDGE SKINNER Case Filed: 04/20/83

Prior Magistrate Number: 83-0007M-01

Defendant:
D1 CARTER, JAMES D

PROCEEDINGS

04/06/83	1	Defendant arrested (MAGISTRATE ALEXANDER) (Dkt'd 04/11/83).
04/20/83	32	Indictment returned (Dkt'd 04/21/83).
04/22/83	38	Arraignment held (Counts 1-5) (MAGISTRATE ALEXANDER) (Dkt'd 04/25/83).
		Defendant enters plea of not guilty (Counts 1-5) (Dkt'd 04/25/83).
05/09/83	74	Motion to suppress evidence filed (MOT#31) (Counts 1-5) (seized at intersection of First and D Street, S Boston) (Dkt'd 05/09/83).

05/19/83	161	Answer to motion to reveal identity of informant, for a bill of particulars, to dismiss, for discovery/inspection, to produce evidence favorable to defendant, for disclosure of list of witnesses, to produce, to suppress evidence, for severance/separate trial, and (MOT#'s 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50) (Dkt'd 05/19/83).
05/25/83	162	Motion to suppress evidence (MOT#31) reserved for District Judge (MAGISTRATE ALEXANDER) (Dkt'd 05/27/83).
07/20/83	181	Superseding indictment returned (Dkt'd 07/21/83).
09/06/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/07/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/08/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).

09/10/83	236	Motion to dismiss, and to suppress evidence hearing (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/12/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/14/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/16/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).
09/17/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (Court takes view of vehicle containing marijuana) (JUDGE SKINNER) (Dkt'd 09/27/83).
	236	Motion to dismiss, and to suppress evidence taken under advisement (MOT#'s 31, 32, 33, 34, 35, 40, 41, 42) (JUDGE SKINNER) (Dkt'd 09/27/83).

10/03/83	242	Filed memorandum in opposition to motion and to suppress evidence (MOT#'s 31, 32, 33, 34, 35) (and consolidated request for findings of fact) (Dkt'd 10/04/83).
10/11/83	253	Filed memorandum in support of motion and to suppress evidence (MOT#'s 31, 32, 33, 34, 35) (Dkt'd 10/12/83).
10/18/83	257	—(MOT#'s 31, 32, 33, 34, 35) (Government's response to defendants' memorandum in support of motion to suppress) (Dkt'd 10/19/83).
12/23/83	270	Order filed (memorandum and order on various motions to suppress and to dismiss) (JUDGE SKINNER) (Dkt'd 12/27/83).
	270	Motion to dismiss, and to suppress evidence denied (MOT#'s 31, 32 33, 34, 35, 41, 42) (JUDGE SKINNER) (Dkt'd 01/24/84).
01/23/84	281	Trial begins-jury (Counts S1-S5) (testimony, evidence) (JUDGE SKINNER) (Dkt'd 01/25/84).
01/27/84	285	Trial ends-jury (Counts S1-S5) (JUDGE SKINNER) (Dkt'd 01/30/84).
	285	Jury verdict of guilty (Count S2) (JUDGE SKINNER) (Dkt'd 01/30/84).

03/19/84	304	Sentencing of defendant (Count S2) (Deft. sentenced to four (4) years imprisonment with a $15,000. committed fine. Execution of sentence is stayed for ten (10) days, and upon the timely filing of an appeal execution of sentence shall remain stayed during the pendency of the Appeal. Deft. shall surrender to the institution designated by the Atty General when directed to do so by the U.S. Marshal.) (JUDGE SKINNER) (Dkt'd 03/26/84).
03/27/84	404	Filed notice of appeal (Count S2) (APPL#3) (Dkt'd 03/28/84).
04/02/84	409	Issued judgment and commitment to U.S. Marshal (Count S2) (JUDGE SKINNER) (Dkt'd 04/04/84).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RELEVANT DOCKET ENTRIES

CR-83-00102-03 CR-83-00102-03

US v CARTER, ET AL
as of 04/17/84 at 11:41 AM

Judge: JUDGE SKINNER Case Filed: 04/20/83

Prior Magistrate Number: 83-0007M-03

Defendant:
D3 MURRAY, MICHAEL F

PROCEEDINGS

04/06/83	10	Defendant arrested (Dkt'd 04/11/83).
04/20/83	34	Indictment returned (Dkt'd 04/21/83). Case assigned to JUDGE SKINNER (Dkt'd 04/21/83).
04/22/83	38	Arraignment held (Counts 1-5) (MAGISTRATE ALEXANDER) (Dkt'd 04/25/83).
		Defendant enters plea of not guilty (Counts 1-5) (Dkt'd 04/25/83).
05/09/83	51	Motion to suppress evidence filed (MOT#8) (Counts 1-5) (evidence seized at intersection of First and D Streets, South Boston) (Dkt'd 05/09/83).

05/19/83	161	Answer to motion to reveal identity of informant, for a bill of particulars, to dismiss, for discovery/inspection, to produce evidence favorable to defendant, for disclosure of list of witnesses, to produce, to suppress evidence, for severance/separate trial, and (MOT#'s 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27) (Dkt'd 05/19/83).
05/25/83	162	Motion to suppress evidence (MOT#8) reserved for District Judge (MAGISTRATE ALEXANDER) (Dkt'd 05/27/83).
		Motion to dismiss, to suppress evidence, for severance/separate trial, and (MOT#'s 16, 8, 9, 10, 11, 12, 15, 17, 18, 19) reserved for District Judge (MAGISTRATE ALEXANDER) (Dkt'd 05/27/83).
07/20/83	181	Superseding indictment returned (Dkt'd 07/21/83).
09/06/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).

09/07/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
09/08/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
09/10/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
09/12/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
09/14/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
09/16/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).

09/17/83	236	Motion to dismiss, and to suppress evidence hearing held (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (Court takes view of vehicle containing marijuana) (JUDGE SKINNER) (Dkt'd 09/23/83).
	236	Motion to dismiss, and to suppress evidence taken under advisement (MOT#'s 8, 9, 10, 11, 12, 17, 18, 19) (JUDGE SKINNER) (Dkt'd 09/23/83).
10/03/83	242	Filed memorandum in opposition to motion and to suppress evidence (MOT#'s 8, 9, 10, 11, 12) (and consolidated request for findings of fact) (Dkt'd 10/04/83).
10/11/83	253	Filed memorandum in support of motion and to suppress evidence (MOT#'s 8, 9, 10, 11, 12) (Dkt'd 10/12/83).
10/18/83	257	—(MOT#'s 8, 9, 10, 11, 12) (Government's response to defendants' memorandum in support of motions to suppress) (Dkt'd 10/19/83).
12/23/83	270	Order filed (memorandum and order on various motions to suppress and to dismiss) (JUDGE SKINNER) (Dkt'd 12/27/83).

	270	Motion to dismiss, and to suppress evidence denied (MOT#'s 8, 9, 10, 11, 12, 18, 19) (JUDGE SKINNER) (Dkt'd 01/24/84).
01/23/84	281	Trial begins-jury (Counts S1-S5) (testimony, evidence) (JUDGE SKINNER) (Dkt'd 01/25/84).
01/27/84	285	Trial ends-jury (Counts S1-S5) (JUDGE SKINNER) (Dkt'd 01/30/84).
	285	Jury verdict of guilty (Count S1) (JUDGE SKINNER) (Dkt'd 01/30/84).
03/19/84	403	Sentencing of defendant (Count S1) (Deft. sentenced to four (4) years imprisonment with a $15,000. committed fine. Execution of sentence is stayed for ten (10) days, and upon the timely filing of an appeal execution of sentence shall remain stayed during the pendency of the Appeal. Deft. shall surrender to the institution designated by the Atty General when directed to do so by the U.S. Marshal.) (JUDGE SKINNER) (Dkt'd 03/26/84).
03/27/84	405	Filed notice of appeal (Count S1) (APPL#4) (Dkt'd 03/28/84).
04/02/84	408	Issued judgment and commitment to U.S. Marshal (Count S1) (JUDGE SKINNER) (Dkt'd 04/04/84).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAGISTRATE'S CASE NO.
MAG 83-0008-J-02

UNITED STATES OF AMERICA
v.

ONE WHITE CINDERBLOCK BUILDING, $1^{1}/_{2}$ STORY, WITH 2 LARGE BLACK GARAGE STYLE DOORS, LOCATED AT THE INTERSECTION OF WEST 1st ST. AND D ST, SOUTH BOSTON, MA, NUMBERED 345, AND ANY VEHICLES LOCATED THEREIN

TO: Special Agents of the FBI
Special Agents of the DEA

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the person of) (on the premises known as) one white cinderblock building, $1^{1}/_{2}$ story, with 2 large black garage style doors, located at the intersection of West 1st St. and D Street, South Boston, MA, such premises bearing number 345 on the outside, adjacent to a black door on the D St. side and any vehicles located therein in the District of Massachusetts there is now being concealed certain property, namely controlled substances, including marijuana, maps, records, lists and other documents pertaining to the purchase, transportation, and sale of controlled substances; money, negotiable instruments, or evidence of financial transactions representing the proceeds of illegal trafficking in controlled substances, as well as records of control of premises, all of which are evidence of violations of Title 21, United States Code, Sections 841(a)(1), 846, 952, and 955 and as I am satisfied that there is probable cause to believe that the property so described is being

concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s),

YOU ARE HEREBY COMMANDED to search on or before 10 days (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (at any time in the day or night)* and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to _____

U.S. Judge or Magistrate

as required by law.

NAME OF AFFIANT
ALLAN KEANEY
SIGNATURE OF JUDGE** OR US MAGISTRATE
JOYCE LONDON ALEXANDER
DATE/TIME ISSUED
4/6/83 10:35 P.M.

* If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable cause therefor.

** United States Judge or Judge of a State Court of Record.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
v.

ONE WHITE CINDERBLOCK BUILDING, 1 1/2 STORY, WITH 2 LARGE BLACK GARAGE STYLE DOORS, LOCATED AT THE INTERSECTION OF WEST 1ST ST. AND D ST., SOUTH BOSTON, MA, NUMBERED 345, AND ANY VEHICLE LOCATED THEREIN

NAME AND ADDRESS OF JUDGE[1] OR FEDERAL MAGISTRATE

JOYCE LONDON ALEXANDER
J.W. McCormack POCH
Boston, MA 02109

The undersigned being duly sworn deposes and says: That he/she has reason to believe that on the premises known as One white cinderblock building, 1 1/2 story, with 2 large black garage style doors, located at the intersection of West 1st St. and D St., South Boston, MA, numbered 345, and any vehicle located therein.

The following property is concealed: controlled substances, including marijuana, maps, records, lists and other documents pertaining to the purchase, transportation, and sale of controlled substances; money, negotiable instruments, or evidence of financial transactions representing the proceeds of illegal trafficking in controlled substances, as well as records of control of premises, all of which are evidence of violations of Title 21, U.S.C. Sections 841(a)(1), 846, 952, and 955.

Affiant alleges the following grounds for search and seizure[2]
SEE ATTACHED AFFIDAVIT

See attached affidavit which is incorporated as part of this affidavit for search warrant

Affiant states the following facts establishing the foregoing grounds for issuance of a Search Warrant.

SEE ATTACHED AFFIDAVIT

Signature of Affiant

Official Title, if any
Special Agent, DEA

[The rest was Illegible]

AFFIDAVIT

I, Allan M. Keaney, being duly sworn, do depose and state the following:

I am a Special Agent assigned to the Boston Office of the Drug Enforcement Administration. I have been so employed for the past thirteen (13) years. During this time, I have been involved in approximately 300 controlled substances cases, including undercover activities, dealing with informants, surveillance, and hand-to-hand purchases of controlled substances. I have information based upon the following:

The information recited below has resulted in the placement of Special Agents of the DEA and FBI on the scene at the white cinderblock building located at the intersection of West 1st Street and D Street, South Boston, MA, and further described herein to safeguard against the removal or destruction of any evidence. Similarly, agents have been stationed at the white wood frame garage at 15 Sylvester Road, Dorchester for the same purpose. The wood frame garage is adjacent to a private residence and in the neighborhood of other private residences. Application is being made for a warrant to search at any time in the day or night so as to minimize the further interference with residential activity, and the unnecessary stationing of agents at the two locations overnight.

On November 29-30, 1982, Special Agent Brendan Cleary of the Federal Bureau of Investigation (FBI) interviewed a confidential informant (hereafter referred to as CI #1). CI #1 stated that in mid March, 1982, a shipment of marijuana came in and CI #1 observed Joe Bangs bragging that he sold 30,000 pounds from Rascals Bar, Broad Street, Boston, in two hours on the telephone. Bangs wanted to deliver one bale to a man known as Kleczka for free and to accomplish this, John Rooney and Glenn Castro left Rascals in separate cars and went to McAvoys Bar in Charlestown. Castro arrived at McAvoys, waited ten min-

utes and was joined by Rooney in a green station wagon. There were several bales of marijuana, wrapped in green plastic and burlap, in the station wagon, which were then transferred by Rooney to Castro's car.

On one occasion in April, 1982, CI #1 told Special Agent Cleary that he was present in the cellar of Rascals with Arthur Barrett and John Rooney and others and that he observed there more than $700,000 in cash. (This information was relayed as was the above on November 29-30, 1982.) At that time, CI #1 had a drug-related conversation with Arthur Barrett who told him emphatically that he (Barrett) was running the show.

On another occasion, approximately in April, 1982, CI #1 was present at Rascals with John Rooney and others. They were joined by Arthur Barrett who stated he had just come from Charlestown, MA, where he had been counting approximately $1 million in drug money. Barrett said he was nervous because he had had only one person with one gun guarding the money.

Rascals is located at 127 Broad Street, Boston, and is owned by the 127 Broad Street Corporation, whose officers are John M. Rooney and Elaine Barrett, wife of Arthur Barrett.

Special Agent Kennedy of the FBI had a conversation with CI #2. (A) CI #2 has provided information to the Boston Office of the FBI, on numerous occasions, over the last three years, which has resulted in the identification of numerous bank burglars, bank robbers, and truck hijackers. Information provided by CI #2 has been consistently corroborated by independent investigation by Special Agents of the FBI and such information has never been found to have been false or misleading. (B) CI #2 stated that on April 6, 1982, one Richard Harrold was getting his supply of cocaine and marijuana from Arthur "Bucky" Barrett and that Barrett had a large supply of cocaine and marijuana in his living room.

On March 11, 1983, another Special Agent received information from a second confidential informant (hereafter referred to as CI #3). CI #3 has proven reliable in the past, and has provided information to the Boston Office of the FBI for more than three years, which information has resulted in the identification of numerous loansharks and bookmakers. Information supplied by CI #3 has in the past been corroborated by other reliable independent confidential sources and by independent investigation by the FBI.

CI #3 informed that Special Agent that "Bucky" Barrett is a major participant in the "Joe Murray crew" and has been observed by CI #3 with Murray in a white Mercury belonging to Barrett. CI #3 informed that Special Agent that CI #3 heard Barrett was in his car with a close aide of Joe Murray in early March, 1983, at which time they engaged in a discussion regarding the importation of marijuana and a load of marijuana scheduled to arrive within the next several weeks.

On February 25, 1983, Hobart Willis, Frederick Hearn, Ronald Barton, and others, were arrested in Dorchester after delivering $200,000 in cash to a DEA undercover agent in partial payment for a shipment of marijuana. Barton has been observed in the presence of Arthur Barrett on numerous occasions by FBI and DEA surveillance agents. CI #3 has stated that Arthur Barrett was involved in the Willis, Hearns, Etc. operation, but was not arrested. During the course of undercover negotiations with the DEA agent for the sale of the marijuana, the agent was informed that the marijuana would be taken after the sale to an undisclosed warehouse in South Boston.

Special Agent Kennedy received information within the last 2 weeks from an Officer of the Boston Police Department, that sources familiar to him had told him that a warehouse in the South Boston area was being used by an organization to store marijuana.

Further, I, along with other Special Agents of both the DEA and FBI, have on a random basis, since August, 1982, conducted numerous surveillances of Arthur Barrett, John Rooney, and other individuals. These surveillances have consistently shown a pattern of meetings revolving around the area of Little Rascals Bar, and other locations in the Greater Boston Area. In order to observe the numerous meetings, it has always been necessary for surveillance agents to conduct lengthy vehicle surveillances of the eventual participants in meetings.

Surveillance over the last two days has indicated the following:

APRIL 5, 1983

Late morning, a white Ford step-up truck (Massachusetts Registration AD 19994) was observed at 15 Sylvester Road, Dorchester, and was parked in the driveway, rear end toward the street, open and appearing to be empty. While the utilities at this premises are listed to Richard Davies, surveillance officers have observed John Rooney at that address on at least 10 occasions over the last six weeks.

John Rooney was observed to leave that address driving the Ford truck. He approached and entered the Pier Restaurant parking lot. Shortly thereafter, Arthur Barrett (hereinafter Barrett) drove out of the same lot in a Mercury Brougham (Massachusetts Registration 937 599) and was followed by John Rooney in the Ford truck; Barrett then pulled to the side of the road and ducked down in the car; the truck proceeded and was followed on the Southeast Expressway to Neponset exit. The surveillance vehicle proceeded to the next exit and then returned to 15 Sylvester Road, where the truck was found to be parked. Shortly thereafter, Barrett arrived in the above-mentioned Mercury Brougham, was joined by Rooney and they left the area in Barrett's vehicle.

At this time, the surveillance was discontinued.

APRIL 6, 1983

Late morning a surveillance vehicle drove by 15 Sylvester Road, Dorchester and noticed the white Ford truck to be parked there. The surveillance moved to the residence of Arthur Barrett in Squantum and noticed that his vehicle, the previously mentioned Mercury Brougham was not there. The surveillance then returned to Sylvester Street and discovered the Ford truck to be gone. Surveillance then moved to the Northern Avenue area where the white Ford truck and the Mercury Brougham were found parked next to one and other with Barrett and Rooney sitting in the Mercury. In a short time, the Mercury, driven by Barrett, drove down Northern Avenue to the Pier Restaurant parking lot, made a u-turn, and returned to the former parking spot. Shortly thereafter, a blue panel truck with ladders on the roof pulled up next to the Mercury Brougham, the driver got out and entered the white truck, where he talked with Barrett. The white truck backed out and went in the direction of the Southeast Expressway. The surveillance vehicle followed at a distance, and suddenly the white truck made a u-turn returning to the direction from which it had come. The surveillance officers were unable to follow, but made note of the Massachusetts Registration of the blue panel truck (AB 66 685). A check of the dock area and of Sylvester Road did not uncover the white truck, but on return to Northern Avenue, the white truck, blue van, and Mercury Brougham were all found to be back at the same location.

Later the white truck and the Mercury were followed to the Southeast Expressway and were later spotted to have returned to Sylvester Road. At Sylvester Road, Barrett was observed running to the door of the garage of number 15 and to open the garage door. Rooney, driving the white truck, backed it into the entry of the garage. One surveillance agent drove by the premises and noticed

an object obstructing the view into the garage at the side of the truck. The truck and the Mercury left 20 minutes later.

One surveillance vehicle, returning to the area of Northern Avenue, passed the warehouse at West 1st Street and D Street in South Boston and observed the previously mentioned blue panel truck in the parking lot. Proceeding to Northern Avenue, the white truck and the Mercury were seen together parked in the vicinity of Santoro's Restaurant. Barrett exited the Mercury, walked to Santoro's, appeared to use the telephone, and then returned to his vehicle. Approximately 15 minutes later, Barrett again exited his vehicle, returned to Santoro's, appeared to make a telephone call, and after five minutes, returned to his vehicle. At this time, Rooney was observed sitting in Barrett's Mercury.

A short time later, the previously mentioned blue panel truck arrived near Santoro's, two men (Michael Murray and James Carter) exited the panel truck, walked to the Mercury, and appeared to talk to the occupants of the Mercury. Murray walked to the white truck, entered it and pulled out. Shortly thereafter, the surveillance vehicles noticed that the white truck appeared to be following a green camper vehicle. The two vehicles were followed to the warehouse at West 1st and D Streets, South Boston, (a white cinderblock building, $1^1/_2$ story, with 2 large black garage style doors, such premises bearing number 345 on the outside, adjacent to a black door on the D Street side). The green camper pulled into the parking area adjacent to the warehouse and the white truck pulled to the side of the warehouse, and then backed into the warehouse bay through one of the two black garage style doors. Carter, driving the green camper, then pulled into the warehouse, and the door was subsequently observed to be closed. Twenty minutes later, both vehicles left the warehouse. The green truck left first and was followed by the white truck. Surveillance agents drove by the garage door entrance and observed a tractor tailer to be

inside, as individuals inside the warehouse quickly closed the door. Both the white truck and the green camper returned to Northern Avenue with Murray driving the white truck and Carter driving the green camper. They again parked in the vicinity of Santoro's, Murray got out of the white truck and walked toward Santoro's. Rooney was observed walking towards Murray, and as they passed, Murray was observed to hand keys to Rooney in a surreptitious manner, without stopping or speaking to Rooney. All vehicles subsequently left the area.

Based on all the information available to the agents at this time, the green camper (Massachusetts Registration AD 71 871) was pulled over on the Massachusetts Turnpike and the occupants placed under arrest. As the surveillance officers approached the green camper, they noticed an odor of marijuana from the cab of the vehicle and noticed through the rear window of the truck bales wrapped in burlap inside the camper section.

After the stop of the green camper on the Massachusetts Turnpike, as previously described, other surveillance agents made a stop of the white Ford truck as it arrived at the location of 15 Sylvester Road, Dorchester. The officers arrested the driver, John Rooney, and at the time of the arrest, noticed a strong odor of marijuana coming from the direction of the truck. The agents opened the rear door to the truck and discovered the contents to be approximately 4,000 pounds in wrapped bales of a green herb substance believed to be marijuana. The truck was parked outside of the garage, which was previously mentioned herein during surveillance observations. This garage is described as a white wood-frame garage building with an A-shaped roof, a gray rollup garage door located at the end of the driveway to the left and rear of 15 Sylvester Road, Dorchester, MA, a white wood frame two-story, one-family house with attic. As this affidavit was being prepared, the owner of the premises at 15 Sylvester Road, one Mr. Davies, informed Special Agents working on this investigation that he rents the garage and was agreeable

to the agents searching it. It is felt that this warrant is necessary because of the rental rights mentioned by Mr. Davies.

I believe, based on all of the foregoing facts, that there is probable cause to believe that controlled substances, including marijuana, as well as maps, records, lists, and other documents pertaining to the purchase, transportation, and sale of controlled substances; money, negotiable instruments, or evidence of financial transactions representing the proceeds of illegal trafficking in controlled substances, as well as records of control of the premises, all of which are evidence of violations of Title 21, United States Code, Sections 841(a)(1), 846, 952 and 955, are concealed and will be found at, the following:

(a) the white wood frame garage at 15 Sylvester Road, Dorchester, MA, more particularly described above and in the attached form affidavit;

(b) the white cinderblock building located at the intersection of West 1st Street and D Street, South Boston, MA, and more particularly described above and in the attached form affidavit; and

(c) one green 1974 Dodge pickup truck with camper top, Massachusetts Registration AD 71 871, registered to Thomas Courteau, 42 Frank Street, Watertown, MA, and currently being held in the custody of the DEA, John F. Kennedy Federal Building, Boston, MA.

/s/
ALLAN M. KEANEY
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me, this ____day of April, 1983.

/s/
JOYCE LONDON ALEXANDER
United States Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
v.

ONE WHITE CINDERBLOCK BUILDING, 1½ STORY, WITH 2 LARGE BLACK GARAGE STYLE DOORS, LOCATED AT THE INTERSECTION OF WEST 1st ST. AND D ST, DOUTH BOSTON, MA, NUMBERED 345, AND ANY VEHICLES LOCATED THEREIN

RETURN

Date Warrant Received
4/6/83

Date and Time Warrant Executed
4/6/83 10:40 p.m.

Copy of Warrant and Receipt for Items Left with
on premises

Inventory Made in the Presence of
Special Agent Sylvester Rutherford

Inventory of Property Taken Pursuant to the Warrant

1. Blue mead spiral binder notebook with numerical notations and names
2. Red mead spiral binder notebook with numerical notations therein
3. Boston Globe dated 4/6/83
4. One empty can of Canada Dry Gingerale
5. Two empty cans of Canada Dry and one carton of orange juice
6. Three full cans of Mountain Dew soda
7. One hand held tape dispenser found on bale #442

8. One hand held tape dispenser found on bale #442
9. One Carter's marker found on bale #442
10. One Magnum 44 marker and 3 Carters markers found on bale #324
11. 10 $100 bills in series beginning with #A11055211A
12. One size 46 tan jacket and dark brown cap found on mirror of yellow GMC
13. 270 burlap bales containing approximately 18,022.9 pounds of marijuana

CERTIFICATION

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ JOHN NEWTON

Subscribed, sworn to, and returned before me this date.

/s/ JOYCE L. ALEXANDER 4/19/83
U.S. Judge or Magistrate Date

REPORT OF INVESTIGATION

FILE NO.
CC-83-Z004

Page 1 of 9

BY: S/A Allan M. Keaney
AT: Boston, MA
File Title BARRETT, Arthur, *et al*
Date Prepared 4-25-83

Other Officers: See page 9

Report Re: Arrest of 6 defendants and seizure of approximately 15 tons of marijuana on April 6, 1983

SYNOPSIS

On April 6, 1983, an FBI/DEA joint investigation culminated in the arrest of six members of a major marihuana smuggling and distribution operation and the seizure of approximately 15 tons of marihuana.

DETAILS

1. At approximately 11:45 a.m., on April 6, 1983, DEA S/A Allan M. Keaney and FBI S/A Roderick Kennedy met FBI S/A's Brendan Cleary and John Newton in the parking lot at the right side of the Pier Restaurant located at 145 Northern Avenue, Boston, MA. At that time, S/A's Cleary and Newton advised that John ROONEY was sitting in a 1982 white Mercury Marquis, Massachusetts registration 937599, which was parked on Northern Avenue across from the Chapel of Our Lady of Good Voyage. This vehicle is registered to Arthur BARRETT at 43 Harbor View Street, Squantum, MA. S/A's Cleary and Newton further advised that the operator of a blue panel truck with ladders mounted on roof racks had parked next to

BARRETT's vehicle and after a conversation with BARRETT had driven off in a white Ford Step Van, Massachusetts registration A/D 19994. According to S/A's Cleary and Newton the white Ford Van had left the area and the blue truck had remained parked beside BARRETT'S Mercury. S/A's Cleary and Newton did not know BARRETT's location at this time.

2. At approximately 11:50 a.m., S/A's Keaney and Kennedy proceeded to leave the Pier parking lot to initiate a surveillance of the Mercury and blue panel truck. S/A's Keaney and Kennedy attempted to drive onto Northern Avenue, the white Van, Massachusetts registration A/D 19994 drove immediately in front of the government vehicle heading inbound towards the Mercury and blue panel truck. S/A Keaney observed the driver of the white van, later identified as Michael MURRAY, to be wearing a dark green shirt and sunglasses. S/A Keaney further observed a second male to be a passenger in the vehicle. This individual was blocked from view by the driver as the truck passed directly in front of S/A's Keaney and Kennedy's OGV.

3. S/A's Keaney and Kennedy followed the white van inbound toward the Southeast Expressway and observed it pull over beside the white Mercury. A few minutes later, S/A's Keaney and Kennedy observed the white Ford Van back out and head towards the Expressway, followed directly behind by the white Mercury. S/A's Keaney and Kennedy observed John ROONEY driving the Ford Van and Arthur BARRETT operating the Mercury. As S/A's Keaney and Kennedy drove past the blue panel truck they observed it to bear Massachusetts registration A/B 66685, which S/A Kennedy recognized from previous investigation as belonging to Michael MURRAY. The Special Agents were unable to observe anyone inside the panel truck as they drove by. A Department of Motor Vehicles check listed Massachusetts registration A/B 66685 as being reg-

istered to Michael MURRAY at 113 Breedens Lane, North Revere, MA on a 1979 blue Ford Econoline.

4. S/A's Keaney and Kennedy followed the Ford Van and Mercury southbound on the Expressway to the Neponset Avenue exit in Dorchester. The entire route, Arthur BARRETT was observed to position his vehicle directly behind the Ford Van leaving no room for any other vehicle to come between the Ford truck and the Mercury. Enroute, S/A Keaney contacted the DEA Boston Office via radio and requested additional assistance due to the nature of activity being observed.

5. At approximately 12:15 p.m., S/A's Keaney and Kennedy observed the Ford Van followed by BARRETT's Mercury drive onto Sylvester Road in Dorchester. As Arthur BARRETT parked on the street, ROONEY was observed to back the Ford Van into the driveway of 15 Sylvester Road. S/A's Keaney and Kennedy observed Arthur BARRETT run to and open the door of the garage located at the end of the driveway. The Ford Van then backed a few feet into the garage. Minutes later, S/A Steven Boeri drove by 15 Sylvester Road and observed the Ford Van backed partially into the garage and BARRETT's Mercury parked in front of the residence. S/A Boeri further observed what appeared to be a large brown cardboard box positioned on one side and a large furniture type object on the other side of the truck; both objects obstructing any view into the garage. A short time later, S/A Robert Sampson drove past 15 Sylvester Road and observed the same situation at the garage.

6. At approximately 12:40 p.m., S/A's Keaney and Kennedy observed the Ford Van driven by John ROONEY and the Mercury Marquis operated by Arthur BARRETT depart Sylvester Road and proceed to the Southeast Expressway via Gallivan Boulevard. Both vehicles were followed northbound by S/A's Keaney, Kennedy, Sampson and Boeri. Enroute, both vehicles traveled at approxi-

mately 40 mph in the right lane with BARRETT remaining several hundred feet behind the Ford truck. The white van parked in front of Santoro's Sub Shop on Northern Avenue at approximately 12:50 p.m. S/A Sampson observed BARRETT drive a short distance outbound on Northern Avenue, make a U-turn, and then park beside the Ford Van. Both ROONEY and BARRETT exited their vehicles and entered Santoro's, staying a very short time. S/A Sampson observed ROONEY walk to an outside pay phone and then join BARRETT in his Mercury. Later, S/A Sampson observed BARRETT walk to the pay phone and minutes later go back to his car. As approximately this same time, S/A Terry Parham observed ROONEY walking back and forth in front of Santoro's apparently looking at traffic as it passed by on Northern Avenue.

7. At approximately 12:55 p.m., S/A's Cleary and Newton advised surveillance agents that they had observed Michael MURRAY's blue panel truck, Massachusetts registration A/B 66685 parked in the lot of a warehouse at 345 D Street in South Boston, MA.

8. At approximately 1:10 p.m., S/A's Newton and Kennedy drove 345 D Street and observed a 1982 GMC Jimmy, Massachusetts registration 129 KGD parked adjacent to the D Street door of the warehouse. This vehicle is registered to Joseph P. MURRAY, 51 Allston Street, Charleston, MA.

9. At approximately 1:15 p.m., S/A Sampson observed a blue panel truck with ladders mounted on roof racks proceed on Northern Avenue towards the Expressway. S/A Sampson notified surveillance agents via radio. Moments later, S/A Parham observed Arthur BARRETT sitting in his Mercury wave to the driver of a blue panel truck with ladders as it drove past Santoro's towards the Pier Restaurant. The panel truck was then lost from view.

10. At approximately 1:25 p.m., S/A Boeri observed the blue panel truck, Massachusetts registration A/B 66685

proceed onto Northern Avenue from Atlantic Avenue. S/A Sampson observed the truck pull into a parking lot adjacent to Anthony's Pier Four Restaurant and park beside a red Cherokee, Massachusetts registration 180 GVJ. S/A Sampson observed three individuals engaged in conversation outside the vehicles. S/A Sampson observed the individual who had operated the blue panel truck to be wearing blue jeans, a green shirt and sunglasses; and the passenger to be wearing a yellow jacket. Shortly thereafter, S/A Sampson observed these two individuals get back into the blue truck and proceed towards Santoro's followed directly behind by the red Cherokee.

11. At approximately 1:30 p.m., S/A Parham observed the blue panel truck occupied by Michael MURRAY and James CARTER park in front of Santoro's Sub Shop on the left side of BARRETT's Mercury. S/A Parham observed MURRAY, CARTER, BARRETT, and ROONEY appear to engage in conversation in front of Santoro's. After a few moments, S/A Parham observed Michael MURRAY enter the driver's side of the white Ford Van previously operated by John ROONEY. S/A Parham observed CARTER who had exited the passenger side of MURRAY's blue panel truck walk out of view behind the Ford Van. S/A Parham then observed the Ford Van operated by MURRAY and a green Dodge Pick-Up truck with a camper top, Massachusetts registration A/D 71871 driven by CARTER back out onto Northern Avenue. S/A Sampson drove up behind the green Dodge which was following the Ford Van and observed CARTER wearing a yellow jacket looking back through the side mirror. Both vehicles were followed one behind the other to the intersection of D and First Streets in South Boston, MA.

12. At approximately 1:45 p.m., S/A's Robert Allen and William Powers observed the green Dodge Pick Up park in the lot at the left of 345 D Street. The white Ford Van stopped on First Street in front of the warehouse. As soon as the right hand warehouse door was raised, the

white van was quickly backed into the building. The green Dodge Camper pulled out onto First Street and also backed into the warehouse. S/A's Allen and Powers then observed the garage door being closed immediately.

13. At approximately 2:05 p.m., S/A's Powers and Allen observed the right door of the warehouse open and the green Camper immediately exit the building, followed directly by the white Ford Van. At this same time, S/A's Powers and Allen drove past the warehouse and observed a white male rapidly pulling the chain that lowers the garage door that was then closed very quickly. S/A Powers also observed a second individual bending over inside the warehouse. S/A's Powers and Allen further observed a tractor trailer rig with a large dark container on it inside the warehouse. As the camper and Ford Van drove to the corner of D and First Streets, S/A Boeri drove by and observed two individuals in each vehicle. Both vehicles were followed to D and Summer Streets, where the green camper made the light. S/A Parham followed the camper. The Ford Van remained at the above intersection until the light changed and then proceeded left onto Summer Street. S/A Parham followed the green Dodge Camper onto Northern Avenue and observed it pull into the lot of the Pier Restaurant. After pulling into the back of the lot the camper turned around and faced out towards Northern Avenue. S/A Boeri followed the Ford Van to the corner of Summer Street and the Viaduct where it made a right turn. At this time, S/A Boeri did not follow the Ford onto the Viaduct.

14. At approximately 2:10 p.m., S/A Parham observed the Ford Van drive past the Pier Restaurant parking lot. The green Dodge Camper drove immediately behind the Ford and both vehicles were observed by S/A's Allen and Parham to park behind each other on the street to the right of Santoro's. S/A Powers observed Michael MURRAY get out of the white Ford Step Van and walk towards Santoro's. S/A Powers further observed John ROONEY walk

towards MURRAY from the direction of Santoro's. When both individuals came together, S/A Powers observed Michael MURRAY without any apparent acknowledgement hand ROONEY a set of keys. S/A Powers then observed ROONEY with the keys in hand enter the white Ford Van and start the vehicle. S/A's Boeri, Martin and Parham followed the Ford driven by ROONEY onto the Expressway headed south.

15. Shortly after 2:10 p.m., S/A Allen observed the blue panel truck, Massachusetts registration A/B 66685 driving on Northern Avenue. As it stopped, S/A's Allen and Kennedy observed James CARTER exit the passenger side of the vehicle and walk to the vicinity of a flower vendor, who was standing on the side of the roadway on Northern Avenue. S/A Kennedy then observed Christopher MOSCATIELLO meet CARTER near the flower stand. MOSCATIELLO was then observed by S/A's Allen and Kennedy to cross to the other side of Northern Avenue. S/A Allen observed MOSCATIELLO enter the green Dodge Pick-Up with camper Massachusetts registration A/D 71871 and drive on Northern Avenue towards Sleeper Street, where the vehicle stopped in the street for no apparent reason. S/A's Allen and Powers then observed the previously seen red Cherokee, Massachusetts registration 180 GVJ operated by Steven KING pull up directly behind the Dodge Camper and follow it via the Southeast Expressway onto the Massachusetts Turnpike. While following the green camper, the red Cherokee operated by KING was observed to change lanes at the exact time and each time the lead vehicle did. The red Cherokee kept directly behind the Dodge Camper never allowing enough room to develop whereby another vehicle could get between them.

16. Based on the above observations and all previous investigative information available to the FBI and DEA Special Agents; the decision was made to effect the arrests of the subjects involved with the white Ford Van, green

Dodge Camper, and red Cherokee as soon as it was determined practicable by surveillance agents.

17. At approximately 2:25 p.m., S/A's Powers, Allen, and Coons stopped the green Dodge Camper, Massachusetts registration A/D 71871 and the red Cherokee, Massachusetts registration 180 GVJ on the Massachusetts Turnpike at the Allston Toll Plaza and placed Christopher MOSCATIELLO, operator of the Dodge and Steven KING, operator of the Cherokee under arrest. S/A Powers moved the green camper out of traffic to a secure area and while doing so, detected the odor of marihuana and through a rear cab window observed burlap bales, the type commonly used to package marihuana. S/A Powers immediately advised other agents via radio of these facts. MOSCATIELLO and KING were advised of their rights per DEA-13A by S/A Powers in the presence of S/A Coons. MOSCATIELLO and KING were transported to the DEA Boston Office for processing. During a search of MOSCATIELLO, S/A's Coons and Tillery seized a silver Master Lock Company key from the subject's sock. The green Dodge Camper was seized by S/A Powers and transported to the JFK Federal Building. The camper section was not searched at this time, due to the fact that an attempt would be made to obtain a Federal search warrant for the vehicle. The red Cherokee was seized for violation of 21 USC 881.

18. S/A's Boeri, Parham, and Martin followed the white Ford Van, Massachusetts registration A/D 19994 driven by John ROONEY to Sylvester Road, Dorchester, MA, where Rooney was observed to back the vehicle up the driveway to the garage. As ROONEY got out of the Ford he was placed under arrest at approximately 2:30 p.m. by S/A's Boeri and Martin. At this same time, S/A Parham walked by the passenger side of the truck, where the window was open and detected a strong odor of marihuana. ROONEY was advised of his rights per DEA-13A by S/A Boeri, in the presence of S/A Parham. At the time

of his arrest, S/A Martin removed a set of keys from ROONEY's hand. S/A Boeri, due to exigent circumstances and probable cause to search, used one of these keys to unlock and open the rear of the truck and in so doing observed Exhibit 3, approximately 60 bales of marihuana in the back of the vehicle. The Ford Van was then seized. The garage at 15 Sylvester Road was secured from the outside in anticipation that an attempt would be made to obtain a Federal search warrant for the premises. S/A Boeri immediately advised other agents via radio of the above activity.

19. At approximately 2:20 p.m., S/A's Keaney and Cleary drove into the lot of the Pier Restaurant. At that time, S/A's Keaney and Cleary observed two males sitting beside each other in the lot; one in a green pick up truck with cap and the other in a gray Mercury Zephyr. As the agents drove in front of these vehicles, S/A's Keaney and Cleary observed the individual in the pick up truck abruptly duck down below the level of the dashboard. S/A's Keaney, Cleary, Morris, and Brady approached each vehicle and made an investigative inquiry of the occupants. The occupant of the green Chevrolet Pick Up truck, New Hampshire registration 151027 was identified as Craig BILLINGHAM of Hopkington, New Hampshire. The occupant of the gray Zephyr was identified as Michael UPTON of West Yarmouth, MA. While questioning BILLINGHAM and UPTON, the above Special Agents together with S/A's Kennedy and Newton, observed Michael MURRAY and James CARTER in the blue panel truck, Massachusetts registration A/B 66685 drive up slowly on Northern Avenue and stop in front of the Pier Restaurant parking lot. MURRAY and CARTER were observed to be watching the activity involving BILLINGHAM and UPTON. As MURRAY and CARTER resumed driving on Northern Avenue; S/A's Kennedy and Newton signaled the vehicle to stop and then made an investigative inquiry of the subjects. Approximately 10 minutes later based on information provided by surveillance agents in Dorchester and on the Massachusetts Turnpike, and the observations made earlier in the day, MURRAY and CARTER were placed under arrest by S/A Newton and G/S Garibotto. S/A Cleary advised both subjects of their rights, in the presence of S/A Keaney. S/A's Cleary and Keaney transported MURRAY and CARTER to 345 D Street, South Boston, MA and then to the DEA Boston Office for processing. During a search of CARTER's person, S/A Coons seized a sheet of spiral lined notebook paper with the numbers 76 through 100, and a Magnum 44 marker among other personal effects. S/A Cleary seized 3 marihuana cigarettes and 5 assorted tablets. Custody of all items taken from CARTER and MURRAY were surrendered to S/A Cleary on April 8, 1983.

20. At approximately 2:30 p.m., S/A's Kennedy and Davis joined S/A Sampson on surveillance of 345 D Street. S/A's Kennedy, Sampson, and Davis during the course of their surveillance observed a short white male, approximately 45 yoa, hair swept back, gloves in his rear pants pocket and smoking a pipe pacing back and forth on D Street, looking at traffic as it passed the warehouse. After circling the block, the agents did not further observe this individual outside the warehouse.

21. At approximately 2:45 p.m., forced entry was gained into 345 D Street via the door located on D Street in order to prevent the destruction of evidence or escape of any suspects. A cursory examination of the building failed to disclose any persons on the premises, however, the strong odor of marihuana was detected and a large number of burlap bales, the type commonly used to package marihuana were observed stashed on the left side of the warehouse floor. When it was determined that there were no suspects within the warehouse and that no further threat existed to the destruction of evidence; the building was secured from the outside in anticipation that application would be made for a Federal search warrant.

22. At approximately 3:00 p.m. Arthur BARRETT arrived and parked in the vicinity of 15 Sylverster Road, Dorchester, MA. After identifying himself, BARRETT was placed under arrest by S/A Boeri and advised of his rights, in the presence of S/A Parham. BARRETT's Mercury Marquis was seized at this time for violation of 21 USC 881. BARRETT and ROONEY were then transported to the DEA Boston Office for processing.

23. At approximately 10:35 p.m. on April 6, 1983, Federal search warrants were obtained from U.S. Magistrate Joyce Alexander for the warehouse at 345 D Street in South Boston; the garage at 15 Sylvester Road in Dorchester, and the green Dodge Pick Up with camper, Massachusetts registration A/D 71871.

24. At approximately 10:40 p.m., the search warrant for 345 D Street, South Boston was executed by FBI and DEA Agents. Seized during a search of the premises were Exhibit 1 270 bales of marihuana, weighing approximately 18,022.0 pounds, two Mead brand spiral notebool bearing numeral and name notations, newspaper, soda cans, tape dispensers, ink markers, $1000 in U.S. currency, a tan jacket, and a digital scale. Also seized was a blue and gray Chevrolet Scottsdale truck, bearing New Hampshire registration 53608 registered to James DAVIDSON, Rolfe Pond Road, P.O. Box #9, Contoocook, New Hampshire. The Chevrolet Scottsdale was parked inside the warehouse and was found to contain Exhibit 5, 25 bales of marihuana weighing approximately 1,492.2 pounds.

25. At approximately 10:41 p.m. the warrant for the garage at 15 Sylvester Road was executed. Seized was Exhibit 2, 55 bales of marihuana, weighing approximately 3,591.8 pounds. Exhibit 2 was transported at approximately 11:15 p.m. in the white Ford Van, Massachusetts registration A/D 19994 along with Exhibit 3 to 345 D Street, where they were secured overnight.

26. At approximately 11:15 p.m., S/A Powers drove the Dodge Pick Up truck, Massachusetts registration A/D 71871 from the JFK Federal Building to 345 D Street. Once the vehicle was secured within the warehouse, S/A Powers, using the key previously seized from MOSCATIELLO subsequent to his arrest, opened the rear camper area and observed Exhibit 4, 25 bales of marihuana, weighing approximately 1,439.6 pounds. The lock, Master Lock Company #292, and the silver key were secured as evidence.

27. Exhibits 1,2,3,4, and 5 and the following seized vehicles: Ford Step Van; green Dodge Pick Up; and blue and gray Scottsdale; were secured overnight at 345 D Street by FBI Agents pending the processing of evidence. On April 7, 1983, S/A'S John Newton and Joseph Coons supervised the weighing, photographing, counting, and sealing of all exhibits and the removing of representative samples from Exhibits 1 through 5. These samples are identified as Exhibits 1A,1B,1C,1D,1E,1F, 2A,2B,2C,3A,3B,3C,4A,4B,4C and 5A,5B,5C; and are reported on DEA-7's. On April 7, 1983, an order to destroy Exhibits 1,2,3,4, and 5, less 18 bales retained for evidence was secured from U.S. District Court Judge Walter Jay Skinner and the evidence was incinerated at the Resco Facility, 100 Salem Turnpike, Saugus, MA on the same date.

28. Custody of all drug and non-drug exhibits, personal effects, and seized vehicles was maintained by the FBI, Boston Field Office.

INDEXING SECTION

1. BARRETT, Arthur M., NADDIS Number 652877.

2. CARTER, James D., NADDIS Number 1293957.

3. KING, Steven D., NADDIS Number 1467089.

4. MOSCATIELLO, Christopher B., NADDIS Number 1467088.

5. MURRAY, Michael F., NADDIS Number 1387232.

6. ROONEY, John M., NADDIS Number 454885.

7. BILLINGHAM, Craig, NADDIS Negative, white male, dob: 2/6/50, Hatfield Road, Hopkington, New Hampshire, SSN 047-44-3891, New Hampshire license number 02 BNC 50061, 6' tall, 190 pounds, occupation: licensed electrician.

8. UPTON, Michael, NADDIS Number 1347462, white male, dob: 3/15/57, 5 Jefferson Avenue, West Yarmouth, MA, SSN 028-42-1093, 6'2" tall, 262 pounds, occupation: Fisherman.

OTHER OFFICERS: DEA G/S Garibotto, S/A's Sampson, Coons, Boeri, Allen, Powers, Parham, Martin and Sullivan. FBI S/A's Cleary, Kennedy, Newton, Morris, Davis, Kelly Rutherford, Giamturco, and Brosnan.

SIGNATURE (Agent) Date
/s/ 5/11/83
S/A ALLAN M. KEANEY

APPROVED (Name and Title) Date
/s/ 5/12/83
G/S RONALD S. GARIBOTTO

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 83-102-S

UNITED STATES OF AMERICA
v.

JAMES DAVID CARTER
MICHAEL FRANCIS MURRAY
JOSEPH MURRAY
JOHN MICHAEL ROONEY
ARTHUR MICHAEL BARRETT
STEVEN DAVID KING
CHRISTOPHER B. MOSCATIELLO

Violations:

21 USC 841(a)(1)—Possession with Intent to Distribute

21 USC 841(b)(6)—Possession with Intent to Distribute in Excess of One Thousand Pounds

21 USC 846—Conspiracy to Possess with Intent to Distribute

18 USC 2—Aiding and Abetting

SUPERSEDING INDICTMENT

COUNT ONE: (21 USC 846—Conspiracy to Possess with Intent to Distribute Marijuana in Excess of One Thousand Pounds)

The Grand Jury charges that:

From on or about April 5, 1983, up to and including April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
JOHN MICHAEL ROONEY,
AND
ARTHUR MICHAEL BARRETT

did knowingly, willfully and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, to wit: knowingly and intentionally to possess with intent to distribute and to distribute a quantity of marijuana, a Schedule I controlled substance in excess of 1,000 pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6); all in violation of Title 21, United States Code, Section 846.

COUNT TWO: (21 USC 846—Conspiracy to Possess with Intent to Distribute Marijuana in Excess of One Thousand Pounds)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
STEVEN DAVID KING,
AND
CHRISTOPHER B. MOSCATIELLO

did knowingly, willfully and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, to wit: knowingly and intentionally to possess with intent to distribute and to distribute a quantity of marijuana, a Schedule I controlled substance in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1)

and 841(b)(6); all in violation of Title 21, United States Code, Section 846.

COUNT THREE: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

From on or about April 5, 1983, up to and including April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
JOHN MICHAEL ROONEY,
AND
ARTHUR MICHAEL BARRETT

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

COUNT FOUR: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,

STEVEN DAVID KING,
AND
CHRISTOPHER B. MOSCATIELLO

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

COUNT FIVE: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
AND
JOSEPH MURRAY,

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

United States District Court for
DISTRICT OF MASSACHUSETTS

DOCKET NO. 83-00102-03-S

UNITED STATES OF AMERICA
vs.

MICHAEL FRANCIS MURRAY

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date 03/19/84

COUNSEL

XX WITH COUNSEL Richard Gargiulo, Esq. (Name of Counsel).

PLEA

XX NOT GUILTY

FINDING & JUDGMENT

There being a verdict of GUILTY. on count 2

Defendant has been convicted as charged of the offense(s) of conspiracy to possess with intent to distribute marijuana in excess of 1,000 lbs., in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6) and 846.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no suf-

ficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years plus a $15,000 committed fine. Execution of sentence is stayed for a period of ten (10) days, and upon the timely filing of an appeal, execution of sentence shall remain stayed furing [sic] the pendency of the appeal. The defendant shall surrender to the institution designated by the Attorney General for service of sentence when directed to do so by the U. S. Marshal's Office.

* * *

U.S. District Judge
Walter Jay Skinner
4/2/84

* * *

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant surrendered on 12-02-1985 to Allenwood Federal Prison Camp at Montgomery, Penna. 17752, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

J.J. CLARK, Superintendent

BY /s/ C.W. WALKER, Legal Tech.

Deputy Marshal

J&C executed and mailed
on 12-30-1985.

C.W. WALKER, Legal Tech.

PRETRIAL TRANSCRIPT

Opening Statement by Mr. Crossen: SEPT. 6, 1983

[Tr.p.39] MR. CROSSEN: At any rate, the testimony with regard to April 6th will be very detailed because of the various facts that the agents observed during the surveillance. But to put it in a nutshell, the surveillance began as it had on April 5th at the mid-morning hours with a very small number of agents, again, conducting surveillance of Mr. Rooney and Mr. Barrett.

Mr. Rooney and Mr. Barrett driving in two separate vehicles were observed to go to the Northern Avenue area of South Boston, again, as they had the day before, and were observed to interact with one another on several occasions, switching into one another's car, conducting apparent conversations in one car, having left the other car, for instance.

Mr. Barrett made several moves, let's say, with his vehicle in that he would drive down a portion of Northern Avenue, return to a meeting place with Mr. Rooney, observations which in the agents' experience they will testify are observations, similarly or oftentimes encountered, where an individual is trying to cleanse themselves of a surveillance agent.

[Tr.p.40] The agent will get into great depth. I will not endeaver to do that, your Honor, but at any rate the surveillance on the 6th starts with Mr. Rooney and Mr. Barrett. At some point the surveillance starts to pick up other people in other vehicles who start meeting with Mr. Rooney and Mr. Barrett and who are relating to both Messrs. Murray and Carter driving in a separate vehicle and Mr. Moscatiello driving in a separate vehicle, and Mr. King driving in a separate vehicle.

The one person you will not hear about in terms of surveillance on April 6th, except in a very collateral sense, is Joseph Murray, the individual who was added by the

superseding indictment. The agents will not testify as to having seen Joseph Murray on April 6th. They will testify as to what are certain Joseph Murray connections on April 6th, but he was not observed on the 6th of April.

At any rate, the Court will hear testimony that a truck, which Mr. Rooney was driving on April 6th, was at some point transferred in custody to what the government suggests is a grouping of Messrs. Carter and Michael Murray, and a truck driven by Mr. King, green Dodge Camper, specifically in the search warrant or motions to suppress was similarly transferred to Messrs. Carter and Murray for what turned out to be a drive back to a warehouse location also in South Boston at the corner of D Street and First Street, [Tr.p.41] specifically, 345 D Street in South Boston.

So we now have, your Honor, based on the surveillance being transferred to other individuals, leaving the four individuals, that is, Mr. Barrett, Mr. Rooney, Mr. King, and Mr. Moscatiello on Northern Avenue, while Messrs. Carter and Michael Murray take the two truck vehicles, larger vehicles of the group, back to a warehouse at 345 D Street. And the Court will hear all of the observations of the various agents with the trucks going in and out of the warehouse at 345 D Street, the activity in terms of the driving that's done by Messrs. Carter and Murray, the surreptitious manner in which keys are transferred from the various people back and forth during the course of this afternoon, the various driving maneuvers that the individuals engaged in during the surveillance. All of this, your Honor, is something that would be counter-productive for me to detail bit by bit, because it will come out in live testimony by various agents.

At any rate, your Honor, having watched these individuals for several hours on the afternoon of April 5th and having surveiled all the surveillance operation, keeping in mind what they already knew about Messrs. Barrett and

Rooney, the agents made a determination at some point armed with what they had to effectuate arrests based on their belief that there was probable cause that the individuals were engaging in narcotics offenses, specifically, believing [Tr.p.42] they were engaging in distribution of marijuana. It's out of these arrests where the agents moved on all of the vehicles and arrested all but Joseph Murray, six individuals in the Boston area on that day.

After they left the Northern Avenue area, many of them—it's out of those searches which the particular set of motions arises from. So at that time there are, of course, warrantless searches arising from the arrests of all of the individuals who may be driving vehicles on that afternoon, and as a result of the warrantless searches and the marijuana that was found pursuant to those warrantless searches, there are further warrant searches which are executed on the evening of April 6th, 1983, after an affidavit was presented to the Magistrate outlining all the factors.

I will point out, he—

THE COURT: Some of the places searched pursuant to a warrant were some of the places searched without a warrant?

MR. CROSSEN: There is one instance of that, your Honor. Essentially, the initial warrantless searches are of vehicles only.

THE COURT: There is a warrant here, I see; isn't there a warrant—

MR. CROSSEN: For a semi-trailer. That was three days later. That and there is a reference to a barge [Tr.p.43] by the name of Halloburton (phonetics) and one other location, I believe a container, a ship container were searched three days later with minimal results, your Honor.

But at any rate, on April 6th, after the search warrants were executed, after these warrantless searches were executed and the cars had all been searched and marijuana had been located, the agents will also tell you there was an exigent circumstance took place, entry made of a warehouse at 345 D Street, the warehouse the agents will tell you the vehicles had come out of prior to their being stopped.

The agents, again, will testify to the reason behind the exigent circumstances entry. To secure the premises to determine whether or not confederates were inside and to what was observed while they conducted that particular entry. It was that one premises that was searched for individuals to determine whether anybody was in a posture to destroy evidence at an early point in the day which was later searched pursuant to a warrant by Magistrate Alexander based on all of the facts that were set out in this particular case.

Essentially, your Honor, all of the defendants who are before the court—and the surveillance of the six defendants includes Joseph Murray—are so intertwined that it would be difficult, I suggest, to fragment consideration of each of the various places searched and the vehicles [Tr.p.44] searched.

SEPT. 7, 1983

[Tr.p.2] BRENDAN O. CLEARY, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

[Tr.p.3] Direct Examination by Mr. Crossen

Q Sir, would you identify yourself, please, and state the organization for which you work?

A My first name is Brendan, B-r-e-n-d-a-n, middle initial O, last name Cleary, C-l-e-a-r-y, Special Agent with the Federal Bureau of Investigation.

• • •

SEPT. 8, 1983

BRENDAN O. CLEARY, Resumed

Cross-Examination By Mr. McMenimen:

[Tr.p.3-11] Q How many FBI agents were involved in this surveillance?

A It depends upon which point of time you are talking about.

Q Let's say from two o'clock on, on the 6th of April?

A Well, I could give you a figure of maybe Brady, Newton, Kennedy, Morris, Fred Davis, probably five or six.

Q How many DEA agents were involved?

A Oh, I don't know.

Q You have no idea?

A No. I would say maybe eight or ten.

Q The warehouse, by the way, was under continuous surveillance from some point prior to two o'clock until the warehouse was entered at the time that you say was somewhere near 2:50 or so?

A 2:45, yeah.

Q It was under constant surveillance?

A Yes, that's correct.

Q When did the constant surveillance of the warehouse begin?

A That would have been after we moved to the back of the Pier Restaurant.

Q 1:15?

A Maybe a little bit earlier. I think what happened was [Tr.p.3-12] when I got back and advised Agent Keaney—because I was with Agent Newton at the time that we observed this blue truck with the ladders on top at this particular warehouse—I think at that point we sent somebody over there right around one o'clock. I'm pretty sure that's correct.

Q At any rate, do you know who the individual was that was sent over there, the first surveilling agent to arrive?

A No, sir.

Q He was joined by others as the day wore on?

A Yes.

Q The decision having been made to arrest everyone, at that point did you also have a discussion as to entering the warehouse?

A Not to my recollection, no.

Q You don't recall having a meeting—You don't recall during the meeting at which it was decided to arrest everybody associated with those trucks, that there was any discussion of entering the warehouse?

A No, sir, I don't.

Q Did Mr. Crossen participate in these discussions, by the way?

A Well, the decision was basically made by myself and Mr. Keaney. Obviously, our supervisors—The probable cause remained the same. I presented him with the facts, [Tr.p.3-13] the probable cause that we had at that point, and that was a decision that was made. He didn't object to what we were doing.

Q The decision being the decision to arrest?

A Yes.

Q Is it your testimony that there was never any consultation or discussion about entering the warehouse at any time prior to its being entered, as you testified yesterday?

A Not in my presence, nor do I recall, no.

Q Were you made aware of any discussions regarding entering the warehouse?

A No, sir.

• • •

[Tr.p.3-26] Q (By Mr. McMenimen) Do I take it from your testimony that the moment Murray and Carter stopped in the blue truck that they were placed under arrest?

A No.

Q What happened?

A They were detained. It was an investigative stop at that point.

Q Now, how were they detained, if you didn't detain them?

A There was probable cause in my mind at that time to arrest them.

Q Please—

A They were detained—If they decided they wanted to leave, they would have been arrested.

Q For all intents and purposes they weren't going anyplace without your permission?

A That's right.

Q And how long did they remain on Northern Avenue before [Tr.p.3-27] being handcuffed and place in your vehicle and taken back to the warehouse?

A Five minutes.

Q Would you say that entire episode took five minutes?

A Five to—I would say two or three minutes from 2:20—Five to seven minutes. Somewhere in there.

• • •

[Tr.p.3-30] Q Did you have a discussion about getting a search warrant for the warehouse at any time prior to Mr. Garibotto, according to your testimony, entering the warehouse?

A Mr. Crossen left, it seems to me, right after Mr. Garibotto. Basically, who was left was Keaney and I. I don't recall any discussion about a search warrant at that point.

Q Was there any discussion of obtaining a search warrant for that warehouse prior to an agent or agents breaking into the warehouse?

A Not by me.

Q Were you aware of any discussions?

A No, no.

Q Your testimony, then, so it's clear, is that you are not aware of any discussion had with agents and Mr. Crossen about getting a search warrant before that door was broken into, that warehouse was broken into; is that your testimony?

A Yes. But I don't know what happened—

Q Just what you are aware of.

A What I'm aware of no.

Q Was there any discussion about breaking into the warehouse, not getting a search warrant, but breaking into the warehouse?

[Tr.p.3-31] A No.

Q That you are aware of?

A No, sir.

Q All right.

So as far as you know, you were taken by surprise when Garibotto, according to your testimony, broke the door in of the warehouse? This was the first time you heard it?

A Yes, sir, I believe so, when I went over there.

• • •

[Tr.p.3-34] Q There are two entrance doors to the warehouse, correct, only one of which works?

A I know the one on D Street. There appears to be a door over there. I don't know whether it works or doesn't. (Indicating)

THE COURT: There is another door on First Street?

THE WITNESS: It appears that there is a door over here. (indicating)

THE COURT: Next to the overhead doors?

MR. McMENIMEN: Next to the overhead doors.

THE COURT: What about the other two sides of the building? I have not seen them.

THE WITNESS: I don't think I have either, your Honor.

Q (By Mr. McMenimen) You don't think you have seen the other side of the building?

A I probably saw the back side coming up D Street at some point in time.

I take that back. I have seen all four sides. If I came down D, I would have seen the back, and I parked in the parking lot on the left-hand side.

• • •

[Tr.p.3-35] MR. CROSSEN: Your Honor, I think Mr. McMenimen and I can agree that the two doors are the only standard type doors on the building. There are no doors on the back side or parking lot side.

THE COURT: So you had two overhead doors and two standard entry doors.

MR. CROSSEN: Yes.

MR. McMENIMEN: I am prepared to stipulate that those are the only doors in that building, if the government will join me in that.

MR. CROSSEN: I have no objection to that.

• • •

[Tr.p.3-44] Cross-Examination by Mr. O'Connell

Q Agent Cleary, I believe you testified yesterday that at about quarter of three you entered the warehouse; correct?

A Yes, sir. A little bit after that.

• • •

Q You entered the walk-in door on the D Street side?

A The D Street side, yes.

Q You say when you went in that door had already been opened?

A Yes, sir, I walked through it. I don't know whether it was open ajar or I just went through it.

Q Was that a steel door?

A I think it is, yes, that's my recollection.

Q It's a handle you just pull it open and walk in?

A Yes.

Q When you walked in, how many agents were inside?

A Okay. My recollection is Supervisor Morris from the FBI, Supervisor Garibotto, Mr. Crossen, Davis, who is [Tr.p.3-45] a supervisor from our office.

Q Brady?

A I don't know. I don't remember seeing him. Newton was there, Kennedy was there, two FBI agents, and there were some DEA agents who I didn't know by name.

Q So is it fair to say—What is the count on that, about ten people, agents?

A Give or take.

Q All right.

When you walked in and these people were already inside, all the people you've mentioned, approximately ten or so, what were they doing?

A Well, it seems to me some were looking under trucks, in trucks. There was a little room off to the side. I think somebody was coming out of there. I only went in there for 30 seconds or so.

SEPT. 8, 1983

[Tr.p.3] RODERICK J. KENNEDY, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination by Mr. Crossen

Q Sir, would you identify yourself, please?

A Roderick J. Kennedy, Special Agent, Federal Bureau of Investigation.

• • •

[Tr.p.3] Q Did you pass and/or stop in the intersection where 345 D Street, that warehouse is located?

• • •

[Tr.p.28] A Yes, sir.

Q And did you make any observations there?

A We observed a white male standing out in front, or it would be the side, the D Street side, by the door, the regular door entrance.

• • •

[Tr.p.30] Q Did you observe anything with respect to the individual who was standing on the corner pacing?

A About that time we were notified that people would be coming to the warehouse. This individual was out of sight, and that was the last time that we observed him.

Q And did you wait for the individuals to join you, the rest of the surveillance agents to join you?

A Yes, sir.

Q Do you know what time they joined you?

A They drove up approximately 2:45.

Q All right. And do you know who joined you?

A I know for sure there was Agent Garibotto was there from DEA, Group Supervisor, and myself was there, and there were several other agents. A couple of other agents came up with Mr. Murray and Mr. Carter in the car.

• • •

[Tr.p.31] Q Were you able to determine how many doors there were?

A There were two main doors, overhead doors, and then there was a side doors which was on D Street.

Q Now, did you do anything with respect to the side door? What was the construction, by the way, of the side door on D Street?

A The side door was a metal door, and it had an access, a slot for U.S. mail.

[Tr.p.32] Q The agents, were they all centered in that particular locus as to the entry of that warehouse?

A There were agents all around the building, the overhanging doors, there were some out front there, there were a couple by the side door.

Q Were they making a significant amount of noise?

A Yes, sir.

Q What happened next?

A The next thing we did was Supervisor Garibotto got a tire iron and squeezed the door from the jam and the door opened.

Q And did you go in?

A We went in.

Q You and who?

A Several other agents.

Q Did you draw your weapons at that time?

A Yes, sir.

Q Garibotto, Special Agent Garibotto, did he go in with you?

A Yes, he did.

Q Do you know who went in first, sir?

A He and I probably entered about the same time.

Q And what did you and any of the other agents you were [Tr.p.33] observing do when you went inside?

A When we went in, agents spread out and some went to one room and just started searching for individuals we believed who were in there.

Q Did you find anyone in there?

A No, sir.

* * *

[Tr.p.33] Q Did you do anything with respect to the whole perimeter of the warehouse at that point?

A At that time we just left it. There were a couple of [Tr.p.34] agents in cars on the street and other agents began to go through the neighborhood.

Q Do you know if any agents were dispatched into town for any purpose?

A Well, two, at least two or three agents went back to the United States Attorney's Office.

Q Did you, sir, remain there?

A I remained there for an hour or two, and then I went back to your office.

Q And did you have cause to go back to the warehouse at any point after leaving my office?

A After I left your office in the early evening, I went back and was positioned on First Street half a block away from the warehouse where I could observe the side door and the front door.

Q Sir, while you were there, both immediately after leaving and after securing the premises and later on in the night after you had been to my office, did anybody enter

the premises that you know of after it had been re-secured?

A No one that I know.

SEPT. 9, 1983

[Tr.p.3] ALAN MICHAEL KEANEY, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination by Mr. Crossen

Q Sir, would you identify yourself, please?

A Alan Michael Keaney, K-e-a-n-e-y.

Q And the organization that you work for?

A I'm a Special Agent for the United States Department of Justice, Federal Drug Enforcement Administration.

* * *

[Tr.p.46] Q (By Mr. Crossen) Now, did you at some point go to the warehouse?

A Yes, sir, I did.

Q What time, if you remember, did you arrive there?

A It was probably around 2:50 p.m., somewhere in that vicinity.

Q All right.

And would you please tell the Court what was going on when you arrived there?

A When I arrived, I parked my vehicle, and I parked in the area located left of the warehouse, and I stayed with Mr. Michael Murray and Mr. Carter, and Agent Cleary went [Tr.p.47] into the warehouse. He returned about one minute later and advised me that the ware-

house was being secured and that the agents in there had observed numerous bales believed to be marijuana.

At that point I left Agent Cleary with the prisoners, I, myself, entered the warehouse. I conferred with DEA Supervisor Garibotto. I told him I would take the prisoners back to the J.F.K. Building for processing and asked him if he had enough help to secure the warehouse. I then would go to the U.S. Attorney's office and attempt to get a search warrant for the warehouse and for whatever vehicles and the garage on Sylvester road.

Q Did anyone, whether it be Agent Cleary or Agent Garibotto or any other agent in the warehouse report to you that any individuals had been found in the warehouse?

A I was advised that no individuals were found in the warehouse.

Q What did you do at that point, sir, after advising Agent Garibotto you were going back in town?

A I immediately left the warehouse, rejoined Agent Cleary, and myself and Cleary transported Mr. Carter and Mr. Murray to the J.F.K. Building.

SEPT. 12, 1983

[Tr.p.5-3] ALAN KEANEY, Resumed
Cross-Examination by Mr. McMenimen

• • •

Q First of all, Agent Keaney, you are the agent—You were the case agent in charge of this investigation on the 6th for the Drug Enforcement Administration; true?

A That's correct.

Q In that capacity you had the responsibility, subsequent to the 6th of April, of preparing a report of this investigation: is that correct?

A For the DEA, that's correct, yes, sir.

Q And in point of fact, you prepared a nine-page typed-written report of the activities leading up to the arrest on the 6th of April; isn't that correct?

A I believe it's nine pages, yes, sir.

• • •

[Tr.p.5-4] Q (By Mr. McMenimen) Now, how many agents of the Drug Enforcement Administration participated in the investigation of this case on the 6th of April?

A Do you want an exact number?

Q Well, the best you can do.

A It was eight or nine.

Q And FBI agents, do you know how many?

A Approximately six, I believe.

Q All right.

Well, from the Drug Enforcement Administration, according to your report, there would be yourself, Group Supervisor Garibotto; right?

A That's correct.

Q Special Agents Sampson, Coombs, Boeri, Allen, Powers, Parham, Martin, and Sullivan?

A Sullivan was not there. He was out later on. He was not there during the surveillances. He was out at 15 Sylvester Road when it was secured.

• • •

[Tr.p.5-5] Q I'm just talking about the 6th of April. Those nine agents, including yourself, that I've named, were to the best of your knowledge the nine agents from the Drug Enforcement

Administration who actively participated in the investigation during the late morning and afternoon of April the 6th; right?

A Correct.

• • •

[Tr.p.5-6] Q Could I ask you how many FBI agents participated in surveillance activities?

A Agents Cleary, Kennedy, Newton, Morris, Brady, Davis—I believe that's all.

Q So that would be six?

A That's correct.

Q So with the nine of you and the six FBI agents that you told us about, there were 15 people involved in the surveillance; right, more or less?

A During the day at various times.

Q Yes.

A That's correct.

• • •

[Tr.p.5-22] Q (By Mr. McMenimen) Now, when was it that you became aware that the green truck, the green camper, was no longer under surveillance, that it had been lost from view of your agents?

[Tr.p.5-23] A It was somewhere between 2:05 and 2:10 that Agent Parham advised me he was following it on Northern Avenue, it made a turn into the Pier parking lot at which time he left, he could not maintain surveillance. He had to go by it, and he lost it from view.

Q Okay. And Parham wound up some minutes later reporting to you that he was following the white van down to Sylvester Road, correct?

A That's correct.

• • •

[Tr.p.5-24] Q (By Mr. McMenimen) And when you pulled into the Pier parking lot, you saw a green camper which you later learned was not the green camper other agents told you was at the warehouse, but you approached that green camper's occupant with your service revolver out and pulled him out of his camper?

A I approached him; I didn't pull him out. First of all, I told him to put his hands on the dashboard. I identified myself, I said we had an investigation going, he would be detained, and then I asked him to exit the vehicle; that's correct.

Q When you had him come out of the vehicle, you looked in the back of his camper and found out that it contained no marijuana; isn't that true?

A I walked to the rear of the vehicle and I made observations through, I guess it's either the side or [Tr.p.5-25] rear window, that it was relatively empty. There was a spare tire and gas can or something.

Q There were no bales of marijuana, right?

A No there were not.

Q Then you went back to your radio and again asked Parham: Where is the green camper; isn't that right?

A I asked him if he was with the green camper.

• • •

Q Well, some time during this 2:15, 2:10 to 2:20 period, didn't you put in your report that the green camper was seen to park in the parking lot of the Pier Restaurant?

A I believe I wrote that Agent Parham observed that they went to the parking lot, made a U-turn, and came out to the edge of the roadway and waited for a white truck.

Q Didn't you write in Paragraph 13 of your report, "Special Agent Parham followed the green Dodge camper onto Northern Avenue and observed it pull into the lot of the Pier Restaurant. After pulling into the back of the lot, the camper turned around and faced out towards [Tr.p.5-26] Northern Avenue"?

A That is what I just testified to, yes, sir.

Q All right.

Then later on the camper you later learned from other agents had made another stop somewhere on Northern Avenue; isn't that correct?

A I was advised by Agent Powers and Agent Allen later on that the green camper with Mass. registration A/D 71871 did stop on Northern Avenue by Sleeper Street for a very brief time, that's correct.

Q Well, when you got the call, you made several calls trying to find out where that green camper was?

A Just one call.

Q Well, I think you testified on Friday that—you testified on Friday that you asked—Mr. Crossen put the following question to you. This is Page 31, turning onto Page 32.

"Q: What was the next report you received with respect to those two trucks?

"A: Agent Parham advised me that the green pickup truck with camper made a left-hand turn into the Pier parking lot, that he had to go by the pickup truck and temporarily lose sight of it." Right?

A That's correct.

Q Okay.

[Tr.p.5-27] "Then the next report I received a while later was that the pickup truck and the Ford were both on Northern Avenue." How much of a while later was that report?

A A couple moments.

Q "A while" is the equivalent of a couple of moments? Do you think you could put it into minutes for us, please?

A Probably a minute or so.

Q A minute or so.

And then you said that you pulled into the parking lot of the Pier Restaurant and in so doing, if I may quote you, "In so doing, I was talking on the radio trying to determine the location of both the Ford truck and the green pickup truck and also all the surveillance units."

You were trying to find out where everybody was?

A That's correct.

• • •

[Tr.p.5-29] Q And while all of that was happening, it was at this time as well that Agents Newton and Kennedy had stopped the blue van, which you identified last Friday as having been Michael Murray's, right on Northern Avenue by the Pier Restaurant parking lot; isn't that correct?

A About the same time, that's correct.

Q All of this was happening rather quickly, isn't that a fair statement?

A It's a very fair statement.

[Tr.p.5-30] Q Were Newton and Kennedy told to arrest the occupants of Mr. Murray's blue van or were they told to identify the occupants of Mr. Murray's blue van?

A They were told to identify and detain them.

Q Okay. And that van—You, as a matter of fact, you drove that van at one point; didn't you?

A Yes, I did.

Q And from the driving compartment, driver's compartment of that van, there is no obstruction that prevents you from looking all the way into the entire contents of that van, the entire rear portion; is that right?

A As I recall, that's correct.

• • •

Q (By Mr. McMenimen) There was nothing in Mr. Murray's van either, was there, no marijuana?

A There were articles in Mr. Murray's van.

Q Were there any bales of marijuana in Mr. Murray's van?

[Tr.p.5-31] A No, sir.

• • •

[Tr.p.5-32] Q At any rate, you will agree with me that there were no bales of marijuana in Mr. Murray's van, right?

A That's correct.

• • •

[Tr.p.5-34] Q And Garibotto arrested them, and how long after he arrested them did he depart and go back to the warehouse?

A Immediately.

Q Did Garibotto put them in your car or did you put them in your car, that is, Murray and Carter?

A I recall myself and Cleary put them into my car.

Q So did Agent Garibotto give you any instructions before going back to the warehouse?

A No.

Q Who else left to go back to the warehouse at the time Garibotto left to go back to the warehouse?

A Mr. Crossen, Agent Newton, Agent Morris Agent Brady.

Q Okay.

And did they all leave—They all didn't go in one car; did they?

A I don't recall who went into the cars, but I'm sure it was more than one car.

Q How long did you remain after Garibotto left, how long did you remain in the Pier Restaurant parking lot with Messrs. Billingham, Upton, Carter, and Murray?

A Probably five to seven minutes, I guess.

[Tr.p.5-35] Q And then you drove back over to the warehouse; right?

A Myself and Cleary drove my vehicle with Mr. Michael Murray and Mr. Carter after releasing Mr. Billingham and Mr. Upton.

Q And while you were on your way over to the warehouse, did you learn via the radio that agents had already entered the warehouse?

A No, I did not.

Q I take it, then, that you did not—Did you know that Garibotto was going over there with the intention of opening up the warehouse?

A No, I did not.

Q So that when you got to the warehouse, you got out of your car and realized for the first time that the warehouse had been entered?

A When I arrived at the warehouse, I maintained custody of the prisoners and Agent cleary entered the warehouse.

• • •

Q (By Mr. McMenimen) When you walked into the warehouse, how many agents were in the warehouse?

[Tr.p.5-36] A I couldn't tell you. I waited until Agent Cleary returned. I went in for one minute and talked to Garibotto. I would say five or six people in the warehouse.

Q There were bales of marijuana in the warehouse?

A There were several bales in plain view on the floor on the left-hand side of the warehouse.

Q And there were trucks in the warehouse?

A There were trucks in the warehouse, yes, sir.

Q And how long do you say you were inside the warehouse talking to Garibotto?

A Less than one minute.

Q Then you left and went to the U.S. Attorney's office?

A No. I returned to the DEA office at the J.F.K. Building.

Q With the prisoners?

A That's correct.

Q Then you signed the affidavit that was prepared for the search warrant to search the warehouse; right?

A I prepared all the search warrants, the three search warrants, yes.

Q And did you write that search warrant affidavit?

A I helped prepare the affidavit.

Q And who else helped prepare the affidavit?

A Agents Kennedy and Cleary.

Q Kennedy and Cleary also helped prepare it?

[Tr.p.5-37] A That's correct.

Q You did not make reference to the fact that all of you had already been inside the warehouse in that affidavit; did you?

A I didn't see the affidavit.

Q You'd have to see it?

A I would have to see it to make reference.

MR. McMENIMEN: It's an exhibit right now, unless the government is willing to stipulate.

MR. CROSSEN: I'm certainly willing to stipulate that it is not mentioned anywhere inside the affidavit, your Honor.

THE COURT: All right.

• • •

Q And you got that affidavit—You got that search warrant at approximately 10:30 at night?

A On April the 6th, that's correct.

• • •

[Tr.p.5-39] Q (By Mr. McMenimen) Did you, with regard

to the affidavit, the search warrant affidavit that you helped prepare, did you intentionally decide not to make mention of the fact in that affidavit that you and other agents had already been inside the warehouse and had already seen marijuana and other evidence?

A As I recall, the discussion was made that we felt a warrant would be needed for the warehouse to conduct a search, that the warehouse had been secured earlier and that as a possible prejudicial aspect not to put that in there. Not to hide anything from anybody, but just not to make it known because it may look like a search and it wasn't a search. So to answer your question, [Tr.p.5-40] it was not to try to hide the fact that anybody entered the warehouse.

Q I just asked you, did you decide intentionally not to include in the affidavit that you and other agents had already been inside the warehouse?

MR. CROSSEN: I object, your Honor. I believe he answered that question.

THE COURT: Well, I suppose it can be derived, but just a plain yes or no.

A Yes, your Honor.

Q Yes is your answer?

A That's correct.

SEPT. 14, 1983

[Tr.p.6-3] RONALD S. GARIBOTTO, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination by Mr. Crossen

Q Sir, would you identify yourself, please?

A My name is Ronald S. Garibotto.

Q And your occupation?

A I'm a Group supervisor with the Drug Enforcement Administration.

• • •

[Tr.p.6-7] Q Now, sir, after your—well, would you relate, please, the rest of the meeting with Agents Keaney and Cleary, if there is anything further that you have that you learned at that time?

A Nothing further of significance.

Q And what did you do after the meeting was terminated?

A I maintained surveillance in the general area of Santoro's Restaurant, but I did not establish visual contact with any of these subjects. That was being accomplished by other agents.

Q Did you continue monitoring the radio?

A Yes, I did.

[Tr.p.6-8] Q As group supervisor?

A Yes.

Q When did you get back involved in a mobile capacity?

A Well, at one point the defendants were headed toward the warehouse in South Boston. They arrived there at approximately 1:45.

MR. McMENIMEN: Objection, your Honor. Unless the witness means every one of the defendants in this case, I'd ask the witness to identify who he claims.

THE COURT: I think in a case this size that that is fair.

THE WITNESS: Yes. The Defendant Murray in a white step van and the Defendant Carter in a green

camper proceeded back to the vicinity of the warehouse. I proceeded in surveillance, although not in visible contact with the defendants, and they did, in fact, according to radio transmissions, arrive at the warehouse. I maintained surveillance in the general vicinity, and at approximately 1:50 rendezvoused with yourself and a supervisor of the FBI by the name of Brady at the Burger King Restaurant.

Q Sir, did you participate in a discussion there at the Burger King?

A Yes.

[Tr.p.6-9] Q What went on at the Burger King as to your best memory?

A Well, there was considerable activity; people introducing themselves to one another. I had not met you before. There was discussion of the status of the investigation. As I recall, the meeting was abruptly ended because there was activity at the warehouse by the trucks. The activity began again at, I believe it was 2:05 that the trucks left the warehouse, and then we had to proceed in the surveillance.

Q When you did that and you left the Burger King, had you given any orders when you were at Burger King by radio to the surveillance agents?

A I had not given any orders because, although I was the senior DEA agent on the scene, the case agent, Al Keaney, was in tactical control of the agents.

Q Was that a decision you made?

A It was a decision I made earlier before that day, and a decision I confirmed at the original meeting at 12:55 between myself, Keaney, and Cleary.

Q Did you observe Agent Keaney give any directions by radio at Burger King?

A No, I did not.

Q Now, what did you do? Where did you go from Burger King?

A Well, I proceeded again in surveillance of the white [Tr.p.6-10] step van and the green camper to the general vicinity of Santoro's Restaurant, and I established a fixed surveillance position at the Anthony's Pier 4 Restaurant parking lot. I did not have visual surveillance of the defendants or their vehicles.

Q Did you move into action from Anthony's Pier 4 into the area of Northern Avenue, and, specifically, the Pier Restaurant area?

A At approximately 2:30 I observed Agent Keaney and, I believe, Cleary approach two vehicles that were parked just opposite from the Pier Restaurant. I proceeded to assist them; and as I was going in that direction, I observed the blue panel truck occupied by the Defendant Michael Murray and the Defendant Carter approach the agents who were then out of their vehicle, stop, and then proceed and park very close to that activity.

Q All right.

And did you do anything with respect to Mr. Michael Murray or Mr. James Carter at that point?

A Not at that point. Other agents stopped them. I did not approach them at that time.

Q Did you observe all of that going on, sir?

A Yes.

Q So you observed what occurred, then, at that time period at the Pier Restaurant; is that correct?

[Tr.p.6-11] A That's correct.

Q What ultimately occurred, sir, at the Pier Restaurant; what was the status of the four individuals who were stopped at the Pier Restaurant, as you understood?

A At the time they were stopped?

Q No, sir.

A What ultimately happened?

Q That's right.

A The defendants, Michael Murray and Carter, were arrested by myself at approximately 2:30. The other two, who were stopped initially, a Mr. Upton and Mr. Billingham, I believe, were released.

• • •

[Tr.p.6-12] Q (By Mr. McMenimen) So you effecutated the arrest of Messrs. Carter and Murray; is that correct?

A Yes.

Q What did you do from there?

A Well, either immediately after arresting Carter and Murray or shortly before I was advised by Keaney that that individual, Upton, whom he had stopped, was known to him as a significant marijuana smuggler or trafficker. I then proceeded in the company principally of FBI agents to the warehouse located at 345 D Street in South Boston.

Q Did you see me at that location as well, sir?

A If I'm not mistaken, you were still in the car with me at the time we proceeded there. We arrived there shortly before 2:45. I rendezvoused there with DEA Agent Sampson and a number of other FBI agents, some of whom were not familiar to me, but among those whom were familiar were Agent Keaney and Group Supervisor Davis.

Upon rendezvousing with Special Agent Sampson, he informed me that at approximately 2:15 p.m. that afternoon he had observed a white male approxi-

mately 45 years of ago smoking a pipe, pacing in front of the warehouse at the intersection of D and First Streets, and, apparently, looking intently at traffic as it passed. Agent Kennedy told me that he had observed the [Tr.p.6-13] same individual at approximately 2:30 in the same attitude at the same location, but that they were in a mobile surveillance at that time and that when they went around the block, the man was no longer there.

• • •

[Tr.p.6-14] Q Sir, did you take a full tour of the building to determine the status of the building?

A Yes.

Q And were you with other agents at that time?

A Yes.

Q Did you announce your office, your position, throughout that door?

A Repeatedly—Well, throughout the tour and repeatedly as we tried to enter through various closed doors within the garage.

Q All right. And did you knock on the doors throughout?

A Yes.

Q After you went to your car and got the tire iron, where did you go from there?

A Directly to the door, which I identified as the front door of D and First Streets, and pried it open at the same time identifying myself as a federal agent and my intent, and when the door opened, I proceeded quickly through it.

[Tr.p.6-15] Q Now, when you testified of the door, you are speaking the sole door on D Street; is that right?

A Yes. The sole door, as I call the sole door, on D Street.

Q When you forced the door open at that point, what did you do and who was with you at that time?

A Well, I wasn't particularly looking at who was with me at that time. I know that the person, or I believe the person who entered directly behind me was DEA Agent Sampson. I entered and observed a large bay area, observed a trailer truck in the bay area, and behind the trailer truck was a large quantity of what I knew to be or believed to be marijuana bales. There was another truck in close proximity to the marijuana bales. I believe it was some fruit company truck.

There was also a pickup camper-type within this place in the bay area. There was also an office area that I went through and observed in the office area an open soft drink can and submarine sandwich that had been taken out of the bag and wrapper opened, but in my recollection not in any fashion consumed.

Q There was an uneaten sandwich on the desk there?

A Yes.

Q Prior to going in there, did you make any attempt to look in windows at the warehouse?

[Tr.p.6-16] A I tried to look through a couple of windows — I have a vague recollection of it—without any success. I, frankly, didn't spend too much time in looking in windows. My interest was in getting inside.

Q Sir, did you draw your service revolver as you entered?

A Yes, I did.

Q Did you observe anything inside other than what you've already testified to; specifically, did you observe any people inside?

A No, I didn't observe any people at all.

Q Were you eventually joined by other agents?

A Well, shortly after I entered, I believe all the agents who were then on the scene entered behind me. I recall specifically seeing Agent Sampson, just directly over my shoulder, as I went through, but I remember seeing Agent Keaney and Agent Davis inside. There were other FBI agents who were then not known to me.

Q All right, sir. How long did you then stay inside the warehouse?

A Approximately three to five minutes.

Q What did you do at that point after the three to five minutes elapsed?

A I was satisfied that there was nobody inside the warehouse, and I instructed everybody to leave immediately, and I closed the door behind me.

[Tr.p.6-17] Q Did the door secure?

A It closed properly. Whether or not it was locked or could be locked, I'm not sure. I did post DEA agents and FBI agents on the outside to maintain surveillance of the building.

Q All right, sir. And did you leave the area then shortly thereafter?

A Approximately 20 minutes thereafter.

• • •

[Tr.p-20A] Q I take it from your testimony, then, that you had made a decision at sometime around 2:30 to enter that warehouse also, is that so?

A Absent any information from the agents who were on surveillance that would indicate that there was no reason to enter the warehouse for protection of the evidence, yes, I had made that decision.

• • •

Cross-Examination by Mr. McMenimen

[Tr.p.6-21] Q In point of fact, there wasn't anybody in there when you opened the warehouse; we all agree to that, don't we?

A I do, yes.

Q Now, I take it that you had reason to believe, according to your testimony, that there was marijuana in that warehouse; is that right?

A I had reason to believe that there was marijuana, yes.

Q Are you saying that you had some cause to fear that that marijuana would be destroyed if you didn't break into the warehouse?

A I was concerned about the destruction of evidence, not as concerned about destruction of a large quantity of marijuana but other evidence that could well be in there.

• • •

[Tr.p.6-22] Q (By Mr. McMenimen) What information did you have as a result of your observations and the observations of the other agents on the 6th of April of that warehouse that indicated that there was evidence other than marijuana in that warehouse?

A I operated under the presumptions that there was other evidence, documentary evidence.

• • •

[Tr.p.6-23] Q (By Mr. McMenimen) Did you have any direct personal knowledge or did any other agent communicate to you any direct personal knowledge of fears that there was some evidence in that warehouse that was susceptible of being destroyed?

A Specifically on April 6th?

Q Yes.

A No.

Q Secondly, did you have any direct knowledge, prior to knocking on that warehouse and announcing your presence and your identification, as you've testified, that someone inside the warehouse would be destroying evidence if there was evidence in there to destroy?

A Did I have any direct knowledge that somebody would be destroying, if there were evidence inside to be destroyed.

Q Yes, that's my question.

A I had no way of having that information, no.

• • •

Cross-Examination by Mr. Gargiulo

[Tr.p.6-28] Q Other than Agent Sampson from his listening to the communications, was there any other DEA agents at the location of the warehouse from the time 2:05, 2:10 to 2:30 viewing the warehouse?

A The only one I'm certain of was Agent Sampson augmented by FBI agents unknown to me.

Q You did a moving surveillance around the warehouse at some point when you were in your car; did you not?

A Around the warehouse? Past the warehouse.

• • •

[Tr.p.6-29] Q And did you go back to execute the warrant at 10:30 that evening?

A No. Well, I returned, but entry had already been made perhaps a half hour earlier.

Q In —

A Let me clear that up. Entry had been made at 10:30, and I returned probably in the vicinity of eleven o'clock.

• • •

[Tr.p.6-31] Cross-Examination by Mr. O'Connell

Q Agent Garibotto, you indicated when you were breaking open the door to the warehouse on the D Street side you had, what was it, a tire iron?

A Yes.

Q And that was taken from the trunk of your car?

A Yes.

Q And when you were doing that, what did you do, put it between the doorjamb and the door and pry it?

A Yes.

Q And when you did that, you did that by yourself; I take it?

A Yes.

Q All right.

And you were the one closest to the door with the tire iron stuck into it to gain some leverage to pull it out; correct?

A I guess that describes my action. I did it as expeditiously as possible, that's how I did it, yes.

Q The point is, you were the only one right at the door at that time, correct?

A Wrong.

Q Who else was there?

A I remember Agent Sampson being right next to me. I was the only one applying the pressure of the tire iron to the door, yes.

• • •

[Tr.p.6-33] Q (By Mr. O'Connell) When you were inside the warehouse, you indicated you saw Agent Kennedy?

A Yes.

Q And you were the first one in?

A That's correct.

Q And the other people came in behind you?

A That's correct.

Q And was Agent Kennedy one of the agents who came in behind you?

A Certainly.

Q Thank you.

SEPT. 15, 1983

[Tr.p.7-50] ROBERT M. SAMPSON, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination

Q (By Mr. Crossen) Sir, would you identify yourself, please?

A My name is Robert M. Sampson.

Q Your occupation?

A Special Agent with the U.S. Department of Justice, Drug Enforcement Administration.

• • •

[Tr.p.7-61] Q Now, sir, were you able – were you in a position to see the D Street side door of that warehouse?

A Yes.

Q And were you in a position to see the length of the building on First Street, that is, where the bay doors were?

A Yes.

Q Did you see anyone go in or out of that building while you were set up on that building during the whole time that you were set up?

A No.

Q And what was the time that you were set up?

A From 2:15 until about 10:30 or 10:40 that evening.

[Tr.p.7-66] Cross-Examination by Mr. Gargiulo

Q (By Mr. Gargiulo) Well, did you know that at 2:15 two FBI agents also were conducting a surveillance of the warehouse?

A No, I did not.

Q How did you know them to be FBI agents?

A I knew one of them.

Q Where was he located with reference to the warehouse?

A He came right up to my position.

Q He drove right up to it?

A Yes.

Q And you talked?

A Yes.

Q And then he left. Where did he go, if you know?

A No. He stayed right with me.

Q In your car?

A Yes.

Q So that now you have an FBI agent with you and who was that?

A Rod Kennedy.

SEPT. 16, 1983

MICHAEL FRANCIS MURRAY, having been called as a witness on behalf of defendants, being first duly sworn, testified as follows:

[Tr.p.8-88] Direct Examination by Mr. Gargiulo

Q Mr. Murray, will you please state your name?

A Michael Francis Murray.

• • •

[Tr.p.8-88] Q Now, calling your attention to the fall of 1982, did you have occasion to acquire a building in South Boston, Massachusetts.

A Yes, I did.

Q And what was its address?

A 345 D Street.

Q And what type of building was it?

A It's a cinder block, a square cinder block building, free standing type, two overhead doors and a single entrance door on D Street and a small door that was [Tr.p.8-89] rendered inoperable on West First Street.

• • •

[Tr.p.8-92] Q Now, at some time after the real estate passing, did you acquire keys to the building at D Street?

A Yes, we did.

• • •

Q What did you do with the keys?

A That afternoon I had two copies of the keys cut. I kept the original, I gave one set to my brother Joseph and one to James Carter.

• • •

[Tr.p.8-95] (By Mr. Gargiulo)

Q Now, would you describe to the Court the entrances and exits that existed in the building on April 6th, 1983?

A Well, it is a single entrance door located the corner of D and West First Street that is used as the entrance and exit from the building. There are two large garage-type overhead doors located on West First Street and to the left is a small passage which at one time could be used to go in and out of which was not operable.

Q On April 6, 1983 there were three doors that you could use to enter and leave the building?

A You couldn't enter through the overhead door. You used the one on D and First to go into.

Q Only three doors were operable in the sense that they would open and close?

A That is correct.

Q With regard to the windows in the building, were there any means by which one could exit or enter the building from any windows?

A No. The windows located in the building were virtually opaque from a curtain arrangement they had prior to us. They also installed some steel bars inside the windows themselves to prevent break-ins, I suppose.

• • •

[Tr.p.8-97] Q At any time after you acquired the building,

did you confer with Mr. Carter and Mr. Murray as to whether or not any business would be conducted out of the building involving the public?

A Yes, we did.

[Tr.p.8-98] Q What was it that was decided upon with regard to doing business with the public?

A There is no public access to the building. It is not the type of business where the public would enter to do any type of business. It was agreed the building would be used as a garage or maintenance type facility.

Q The public did not have access to the building?

A No.

Q Other than the three persons you just testified to who had keys. Did anyone else have the right to enter or leave the building?

A Not without checking with us first.

Q Did—

A Or if they obtained keys.

Q Was there any means by which one could stand on the public sidewalk surrounding the building and peer into the building through any window or door on April 6, 1983?

A Well, the entrance door located on the corner of D and West First had a small mail slot that was used, you know, naturally to drop the mail in. There were several windows located on that corner of the building. Looking into them would be virtually obscured.

Q Now, with regard to the door on the street, how was it fastened on April 6?

[Tr.p.8-99] A The walk-in door on the street?

Q Yes.

A It had a dead bolt lock located above the handle. The handle had a lock on it too. You need two keys to get in the building.

[Tr.p.8-123] SYLVESTER RUTHERFORD, having been duly called as a witness on behalf of defendants, being first duly sworn, testified as follows:

[Tr.p.8-124] Q (By the Court) Mr. Rutherford, you were at 345 D Street sometime around 10:30 p.m. on April the 6th, 1983?

A Yes, sir.

THE COURT: Outside a white cinderblock warehouse, I take it?

THE WITNESS: Yes, sir.

Q And you received a radio communication concerning the [Tr.p.8-125] issuance of a search warrant?

THE WITNESS: Yes.

THE COURT: In the course of that communication, were you told what you were authorized to search for?

THE WITNESS: No, sir.

THE COURT: What did you, in fact, search for when you executed the search of the building?

THE WITNESS: Drugs and all paraphernalia associated with drugs.

* * *

Direct Examination by Mr. McMenimen

Q Did a copy of the warrant ever arrive, to the best of your knowledge, while a search of the warehouse was being conducted?

A I don't know.

SEPT. 19, 1983

[Tr.p.9-29] STIPULATION BY COUNSEL:

MR. CROSSEN: I take it we have a stipulation which I will try to state for the record. . . .

* * *

[Tr.p.9-30] Agent Keaney would testify he physically took the warrant from Magistrate Alexander, gave the call with respect to them having been signed, drove to 345 D Street in South Boston, at which time the warehouse had already been entered pursuant to the radio call, that he gave the copy of the search warrant to his superiors, and the search then proceeded pursuant to the warrant as it arrived on the scene. That would be essentially their testimony.

That was eleven o'clock, by the way, Agent Keaney would testify he arrived at the warehouse, approximately.

MR. DiMENTO: Did you mention the 10:40 time?

MR. CROSSEN: I believe the warrant indicates they were signed at 10:40, your Honor.

MR. McMENIMEN: The search had commenced [Tr.p.9-31] before they arrived?

MR. CROSSEN: We agree they were in the warehouse before.

THE COURT: The testimony is they received a radio call that the search warrant had been signed and received?

MR. McMENIMEN: I join in the stipulation.

TRIAL TRANSCRIPT

JAN. 23, 1984

BRENDAN O. CLEARY, having been called as a witness

on behalf of the government, being first duly sworn, testified as follows:

[Tr.p.6] DIRECT EXAMINATION BY MR. CROSSEN

Q Sir, would you identify yourself, please?

A Brendan O. Cleary, C-l-e-a-r-y, Special Agent, Federal Bureau of Investigation.

* * *

Q [Tr.p.32] Sir, did you get involved with Messrs. Carter and Murray, Michael Murray, at that point?

A [Tr.p.33] Completed interviewing the individual in the green camper and the Mercury Zephyr, and at that point Mr. Carter and Mr. Murray were put into Agent Keaney's vehicle and we transported them.

Q When you say you transported them, did you make some decision that you put into effect after bringing these people to a stop in their blue van?

A Well, they were going to be placed under arrest.

Q At some point you placed them under arrest?

A I think Agent Garibotto and Agent Newton accomplished that.

CROSS-EXAMINATION BY MR. McMENIMEN

* * *

[Tr.p.33] Q Now, in your direct testimony you indicated that Mr. Carter was placed under arrest by agents — as you recall by Agent Garibotto and Agent Newton at approximately what time of day?

[Tr.p.34] A 2:20, something like that.

[Tr.p.2-9] BRENDAN O. CLEARY, Resumed
CROSS-EXAMINATION BY MR. O'CONNELL

Q Now, with respect to the general location of this area, First and D Street, is it fair to say it's a relatively heavy industrial area?

[Tr.p.2-10] A Medium — either way, medium-heavy industrial.

Q All right.

Well, in any event, across the street from the warehouse to the left, if one were standing on First Street looking to the left, you would see Shaughnessy Crane Company; correct?

A On First Street looking to the left?

Q If you put your back to the front of the warehouse and you looked to the left diagonally across D Street, you would see Shaughnessy Crane; correct?

A That's correct.

Q That's a heavy equipment place, isn't it?

A Right.

Q There is also in that vicinity an iron company, is their not, or a steel company?

A Yes, sir.

Q If you look to the opposite direction, to the right, if you have your back to the overhead doors of the warehouse, you would see Simple Trucking Company; correct?

A That's correct.

Q That is a company that deals with by-products, anyway, of heavy trucks and equipment and so forth?

A That's correct, sir.

[Tr.p.2-23] RODERICK J. KENNEDY, having been called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CROSSEN

Q Sir, would you identify yourself, please?

A Roderick J. Kennedy.

Q And your with what agency, sir?

A I'm a Special Agent with the Federal Bureau of Investigation.

• • •

[Tr.p.2-53] **CROSS-EXAMINATION BY MR. McMENIMEN**

Q How much time would you say elapsed from the time you lost sight of the step-van, the white step-van, and the time you effected the arrests of the occupants of the blue paneled truck?

A I never arrested the occupants of the blue truck, but I would say we left the warehouse at 2:05 and we stopped the occupants of the blue Econoline van at approximately 2:20 to 2:25 p.m.

Q So some 15 to 20 minutes would have elapsed, give or take, from the time you last saw the van to the time that you detained, if you will, or you stopped the blue panel truck and identified its occupants?

A That is correct, sir.

Q And the distance from the warehouse on D Street to the Pier Restaurant on Northern Avenue would it be fair to say it's probably less than a mile and a half?

A I would say that's correct, sir.

Q Okay.

Actually, it's a distance that you could travel, given

[Tr.p.2-54] traffic conditions, anywhere from five to eight minutes?

A Approximately, sir.

JAN. 25, 1984

ALLEN MICHAEL KEANEY, having been called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CROSSEN

[Tr.p.3-133] Q Would you identify yourself, please, sir?

A My name is Allen Michael Keaney, K-e-a-n-e-y.

Q And your occupation?

A I'm a special agent with the United States Department of Justice Drug Enforcement Administration.

• • •

[Tr.p.3-147] Q And after receiving those communications, what else happened?

A As a result of those conversations, I instructed agents to place Mr. Carter and Mr. Murray under arrest.

Q Was that done in your presence?

A Yes, it was.

Q Did you do anything with respect to Mr. Carter and Mr. Murray at that time?

A I placed them in the rear of my vehicle with Agent Cleary. Agent Cleary advised them of their rights in my presence.

Q Did you take them into Downtown Boston for processing?

A Yes, later on.

Q Now, sir, did you have anything to do, prior to doing that, with the 345 D Street location?

[Tr.p.3-148] A Prior to taking the prisoners to Boston, I did proceed to the warehouse at 345 D Street.

Q And what did you do there?

A I entered the warehouse for a brief period of time.

Q How brief a period of time would you say you were inside there?

A Approximately one minute.

Q And at some point did you and other agents leave?

A Myself and Agent Cleary left with Mr. Murray and Mr. Carter.

Q Where did you to?

A To the JFK Building, the DEA office.

Q Now, did you spend the rest of the afternoon doing something after Mr. Murray and Mr. Carter were processed at the FBI office?

A Yes, I did.

Q What was that?

A I came to the U.S. Attorney's Office in this building and with other agents attempted to secure search warrants.

Q All right, sir.

At some point did you, in fact, secure search warrants for certain locations?

A Yes, sir.

Q And the locations, if you would, sir?

A The warehouse at 345 D Street in South Boston. A green [Tr.p.3-149] pickup truck with camper, I believe

Mass. registration A over D 71871, and the garage at 15 Sylvester Road.

Q And do you recall what time you did that?

A The search warrants were signed by the U.S. Magistrate approximately 10:30 p.m. April 6th.

Q After they were signed, did you go somewhere?

A Yes, I did.

Q Where was that?

A The warehouse at 345 D Street.

Q Did you go into the warehouse at that point?

A Yes, sir.

Q Were there other agents in the area also that went in?

A Yes, sir.

Q What did you observe when you entered?

MR. CULLEN: Objection. I ask that this not be admitted against Steven King.

THE COURT: This is Sylvester Road?

MR. CULLEN: No, the warehouse, your Honor.

THE COURT: Oh, no, no. The objection is overruled.

Q What specifically that you recall that you observed when you entered?

A When I entered I observed approximately four vehicles. I observed a large number of burlap bales.

Q Do you recall specific vehicles that you observed?

[Tr.p.3-150] A Yes, sir.

Q Would you tell us please as best you can recall?

A On the right-hand side rear of the warehouse there was a green tractor trailer rig, just the tractor part. Beside that to the left was a blue and gray Scottsdale, Chevy Scottsdale vehicle, camper-type vehicle. In the middle of the warehouse I observed a white Lilly truck, tractor rig part with a flatbed behind it. On that was a large container, large rectangular container, 30 feet long and 8 feet tall, rusty brown color.

In the rear left-hand corner, I observed a truck with a 20 foot box on the back surrounded by marijuana bales to it's immediate front and on the driver's side.

Q All right, sir.

Agent Keaney, first I'm going to put before you two items.

Q If I may, sir, before I do that, at some point with respect to the blue Chevy Scottsdale, you talked about, did you open any portion of the truck?

THE COURT: Gray, wasn't it?

Q What color was it, sir?

A Blue and grayish.

THE COURT: I thought he said gray earlier.

MR. CROSSEN: He probably did, your Honor.

THE COURT: Blue-gray, all right.

[Tr.p.3-151] Q Did you open a portion of the truck at some point?

A Yes, the rear portion.

Q Did you make an observation of the inside of the Chevy Scottsdale?

A Yes, sir.

Q And what did you see inside?

A A large number of burlap-type bales.

Q First, I'm going to put before you one item and ask if you recognize it, sir?

A Yes, I do.

Q And where have you seen that before?

A This is the blue and gray Chevy Scottsdale in the right-hand corner of the warehouse on April 6th.

Q All right, sir.

Second, I'm going to put before you another item, if you would. And ask you the same question; that is, do you recognize it?

A Yes, I do.

Q Where have you seen that before?

A This is the rear area of the same Chevy Scottsdale.

MR. CROSSEN: Your Honor, I would offer them as a Government Exhibit at this time.

MR. CULLEN: I object on behalf of Steven King.

THE COURT: No. I think the line of [Tr.p.3-152] permissible inferences taken in a chain provide a sufficient connection. The objection is overruled.

(Government exhibits 12 and 13 admitted in evidence, two photos.)

Q Sir, next, if my recollection is correct, you mentioned a green Mac truck; is that correct?

A Green truck, tractor part of a green truck, yes, sir.

Q I put two items before you and ask you if they appear to be familiar to you, sir?

A Yes, they do.

Q Where did you see them before?

A The same green truck I observed April 6th at the warehouse at 345 D Street.

MR. CROSSEN: Your Honor, I offer them.

MR. CULLEN: Objection.

THE COURT: Overruled. They are admitted against all defendants.

(Government Exhibits 14 and 15 in evidence, two photographs.)

Q Sir, with respect to a trailer that you observed in there with something on top of it, would you describe that for us please?

A The tractor rig was white. I think it had the words Lily, L-i-l-y, in red letters. On the back of the flatbed was a large rectangular-type container, a redish-brown [Tr.p.3-153] container on the back.

Q Agent Keaney, this item I'm placing before you, do you recognize that, sir?

A That's the Lily tractor rig that I observed at the warehouse on April 6th.

Q The second item, which I'm placing before you, do you recognize that?

A Yes, sir.

Q Where have you seen that?

A At the warehouse on April 6th.

Q Is it Lily which is in the first picture, depicted in the left corner of the second picture, that I put before you?

A On the mud guard of the left rear of the tractor trailer.

Q Well, specifically, what I mean is the car which is depicted in the first picture shown as well as on the second picture?

A Yes, sir, it is.

Q Lastly, sir, do you recognize that?

A Yes, sir.

Q And what is that, sir?

A That's the rear area of the tractor trailer with the license registration on it.

Q The registration is what, sir?

A 13379.

[Tr.p.3-154] Q Is that with a TR in front of it?

A T over the R, yes, sir.

* * *

[Tr.p.3-156] Q Agent Keaney, you mentioned one last truck that you saw inside the premises, do you recall that?

A Yes, sir.

Q That truck was what?

A It was a cab with a 20-foot back with Lily. It was parked on the left-hand corner rear of the warehouse.

Q Was there anything in the vicinity of it?

A Yes, sir.

Q What was that?

A Numerous bales stacked up about four feet high to the immediate front and also the driver's side of the vehicle.

[Tr.p.3-157] Q Sir, I'm going to place two items in front of you and ask you to look at them and tell you if you recognize them?

A Yes, sir, I do.

Q Where have you seen that, sir, before?

A On April 6th at the warehouse on D Street in South Boston I observed these — this vehicle and these bales in the warehouse.

Q Is that a fair and accurate representation of one corner of the warehouse where that vehicle was parked?

A Yes, sir, it is.

Q Thank you.

MR. CROSSEN: Your honor, I offer them as government exhibits at this time.

MR. CULLEN: I object and move to strike his testimony as well.

THE COURT: All right. I am going to admit the testimony and the exhibits on the same basis that I explained to you at the side bar.

(Government Exhibits 19 and 20 admitted in evidence, two photographs.)

THE COURT: Agent Keaney, did you attempt to heft any of these bales, to pick them up?

THE WITNESS: I don't recall specifically doing that, your Honor, no, sir.

THE COURT: Do you have any idea what they [Tr.p.3-158] weigh, each bale?

THE WITNESS: I'd say between 40 and 50 pounds.

* * *

CROSS-EXAMINATION BY MR. GARGIULO

[Tr.p.3-18] Q When the warehouse was entered at 2:45, was any individual found?

A No, sir.

Q No one was arrested?

A At the warehouse?

Q Yes.

A No, sir.

* * *

[Tr.p.3-183] CROSS-EXAMINATION BY MR. O'CONNELL

Q Agent Keaney, when you went in the first time, you say this was around quarter of three or so?

A After quarter of three.

Q All right.

And you entered the door that was on D Street, the walk-in door?

A Yes, sir.

Q And when you walked in, was there an office area immediately upon your entry?

[Tr.p.3-184] A I believe there is to the right, yes, sir.

Q As a matter of fact, that doorway opens right into an office area and then after you pass through that office area, you get into the base of the warehouse; correct?

A I believe so. I don't really remember that.

Q All right.

In any event, from quarter of three until the next time you entered, which was what, 10:30 or so?

A It would be after 10:30.

Q Eleven o'clock that night?

A Probably close to 11 clock.

Q From that point to when you entered the second time, was the place under surveillance?

A I wasn't there, but normal procedure is it would be surveiled and secured from the outside.

Q All right.

Now, standing, if you would, with your back to the double doors on each side of you inside the warehouse, can you orient yourself to that setting?

A I believe so.

Q Correct me if I'm wrong, but in the far right corner, on what would be the office wall on the inside of the bay, was the green Mac tractor, correct?

A As I recall, it's on the right-hand side, yes.

Q And there were no marijuana bales in that tractor, was [Tr.p.3-185] there?

A Not that I'm aware of.

Q Did you know whether or not the keys to that tractor were in the ignition or in the cab of the truck?

A I don't know, sir.

Q Did any agents look for that?

A I would assume they had, but I don't know.

Q Now, with that truck on the far right with your back to the two doors on the inside, on the far left you indicate there was a box-type truck bearing the designation "highway" on the side; correct?

A I think the "highway" is on the front. It may be on the sides.

Q Was it on the side of the box; do you recall?

A I recall, I believe, it's on the front. It may be on the side, I don't recall.

Q All right.

Now, did you look inside the box of that truck?

A Yes, sir.

Q And there were no marijuana bales in that truck; were there?

A No, sir.

Q As a matter of fact, there was some furniture inside that truck, was there not?

A Yes, sir, there was furniture.

[Tr.p.3-186] Q And did you look to see whether the keys were in the ignition of that truck or in the cab of that truck?

A I didn't, no, sir.

Q Do you know whether any other agents did or didn't?

A I don't know.

Q With respect to that highway truck that was on the far left and the Mac tractor on the far right, no forfeiture proceedings were ever commenced against those vehicles, were there?

MR. CROSSEN: Objection

THE COURT: Sustained.

Q With respect to the green Dodge camper and the white step-van, Ford step-van, and the Scottsdale truck, all of which you say contained bales, were there forfeiture proceedings commenced against those vehicles?

MR. CROSSEN: Objection.

THE COURT: Sustained.

Q With respect to the Lily vehicle, the tractor and the trailer with the container on it, no bales were found on that vehicle; were there?

A Not to my knowledge.

JAN. 26, 1984

[Tr.p.4-16] NICHOLAS GIANTURCO, having been called as a witness on behalf of the government, being just duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CROSSEN

Q Sir, would you identify yourself, please?

A My name is Nicholas D. Gianturco, G-i-a-n-t-u-r-c-o.

Q Your occupation, please?

A Special Agent with the Federal Bureau of Investigation.

Q And sir, did you have occasion to become involved in some matter with a building at 345 D Street in South Boston on April 7, 1983?

A I did.

Q What time in the day was it that you went out there, sir?

A It was the morning, approximately 9:00 or 9:30.

Q What did you do on arriving there?

A I was asked to process different items that were found in the warehouse, go through and package them and initial them and get them ready for possible fingerprints, and everything else.

Q All right. And where did you start your project while you were there?

A There was a flatbed truck on the left as you — as you entered the warehouse, and that is basically the area where I started.

Q Could you describe for the jury what types of materials you seized, sir?

* * *

[Tr.p.4-17] A I seized tape dispensers. I seized marks-a-lot. I seized a newspaper. I seized different cans that were there, a jacket, and a hat, and ten $100 bills.

Q Do you recall what you seized first?

A I believe it was a blue notebook, an eight by ten notebook.

* * *

(By the Court) Would you describe the notebook, please?

Q Physically describe it, sir.

A It was a blue spiral notebook, approximately eight by ten. It had pages in it, and there was writing. I processed it, put it in a bag, and initialed it.

[Tr.p.4-25] THE COURT: Tell me where it was found.

MR. CROSSEN: It was found on the hood of the gray Scotsdale Chevy pickup, inside the warehouse, your Honor.

[Tr.p.4-46] THE COURT: The exhibit is conditionally admitted, subject to the various conditions and comments that I made at the side bar previously.

(Red notebook marked as Exhibit No. 30.)

CONTINUED DIRECT EXAMINATION BY MR. CROSSEN

Q Agent Gianturco, after you did that, what was the next thing you did?

A After that process, I think there was a Boston Globe, and there was some cans, in the same manner.

Q You saved those items, as well?

A That's correct.

Q Where did you find those items?

A They were around the flatbed of the truck — the van, and the other truck that was in that area.

From there, we proceeded — we found some tape dispensers, and some Marks-a-lot that were on bales of marijuana that was in the warehouse.

Q Excuse me for a second. I think I forgot to ask you one question with respect to the red notebook. That is, where did you find that?

A I believe the red notebook was on the hood of one of the vehicles that was parked near — it was on the left-hand side of the area that I was responsible for.

* * *

[Tr.p.4-48] A These are the Marks-a-lots that were on the particular bales.

Q So, you found them on bales within the warehouse; is that correct?

A That's correct, on the left-hand side of the warehouse.

MR. CROSSEN: Your honor, I would offer what are four different markers at this time. Excuse me, five different markers at this time.

MR. CULLEN: Objection.

THE COURT: Overruled.

* * *

THE CLERK: Government's 31, 32, 33, 34, and 35 so marked. (So Marked.)

* * *

Q What did you find after those items?

A At the same time that the — that several of the [Tr.p.4-49] marks-a-lots were found, we also found tape dispensers on the same bales.

* * *

MR. CROSSEN: Your Honor, I would offer each as

a Government exhibit.

MR. CULLEN: Objection.

THE COURT: Overruled. They are admitted, minus the bags.

PETITIONER'S

BRIEF

Nos. 86-995 and 86-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JAMES D. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE PETITIONERS

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
EVAN MILLER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

When officers discover evidence during a warrantless and illegal search, later obtain a warrant, "search" the premises again and remove what they previously found, must such evidence be suppressed or does the inevitable discovery doctrine create an exception to the exclusionary rule in such circumstances?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

JAMES D. CARTER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 1a-31a), as modified (Pet. App. 50a-51a), is re-

ported at 771 F.2d 589. The opinion of the district court (Pet. App. 32a-48a) is not officially reported. The opinion of the court of appeals on remand from this Court (Pet. App. 52a-61a) is reported at 803 F.2d 20.

JURISDICTION

The original judgment of the court of appeals was entered on August 26, 1985 (Pet. App. 49a). After the court of appeals denied petitions for rehearing (Pet. App. 50a), Michael R. Murray and James D. Carter filed separate petitions for a writ of certiorari (Nos. 85-1118 and 85-1105). On May 27, 1986, this Court granted the petitions, vacated the judgment and remanded the case to the court of appeals "for further consideration in light of *Henderson v. United States,* 476 U.S. _____ (1986)." *Murray v. United States,* ___ U.S. ___, 106 S.Ct. 2241 (1986); *Carter v. United States,* ___ U.S. ___, 106 S.Ct. 2241 (1986). On October 7, 1986, the court of appeals entered its judgment on remand (Pet. App. 65a). On October 31, 1986, the court denied a timely petition for rehearing (Pet. App. 62a). Petitions for a writ of certiorari were filed on December 17, 1986, and December 20, 1986, and were granted on March 9, 1987, limited to the Fourth Amendment issue. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioners Michael F. Murray and James D. Carter were named in a five count indictment charging possession of more than one thousand pounds of marijuana with intent to distribute, and conspiracy, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6) and 846 (repealed 1984). After a five-day jury trial, Murray and Carter were acquitted on two counts, convicted on one count of conspiracy and sentenced to four years' imprisonment and a $15,000 fine.

Prior to trial, Murray and Carter moved to suppress evidence found in a warehouse. The suppression hearing revealed that the warehouse had been searched on April 6, 1983, eight hours before a warrant issued.

A.
THE SEARCHES OF THE WAREHOUSE

By early afternoon on Wednesday, April 6, 1983, fifteen agents of the DEA and FBI were monitoring every movement of Murray, Carter and the other original defendants in this case[1] (JA 49, 61-62). Some

[1] The other defendants monitored on April 6, 1983, were Arthur Barrett, John Rooney, Christopher Moscatiello and Stephen King. They were each charged with a conspiracy count and possession count. Joseph Murray was also named as a defendant by a superseding indictment, but he was not under surveillance

of the agents had been conducting moving surveillances of a white Ford truck, a green camper and a blue van.

About 2:00 p.m. agents in the South Boston section of Boston, Massachusetts, saw the white truck and the green camper pull into a warehouse at 345 D Street, near the intersection of West 1st Street (JA 13, 49-50, 79, 82-83). When the white truck and green camper left the warehouse minutes later, several DEA agents followed both vehicles, observed a driver exchange as the vehicles were parked and then followed the green camper as it headed toward the Southeast Expressway and on to the Massachusetts Turnpike. (JA 71-74; Trial Tr. 3-79–3-80). Other agents followed the white truck to Dorchester, Massachusetts (JA 62-63).

Still other agents mistakenly believed that no surveillance was being conducted of the green camper after it left the warehouse (JA 62). These agents drove to a restaurant on Northern Avenue near B Street, which they had been using as a rendezvous. Before meeting there with the rest of their contingent, including an Assistant United States Attorney,[2] they saw a green camper in the restaurant parking lot, drew their revolvers, arrested the occupant and looked

---

on that date.

Rooney and Moscatiello entered conditional guilty pleas (see Rule 11(a)(2), Fed. R. Crim, P.). Barrett became a fugitive before trial. The court granted Joseph Murray's motion for judgment of acquittal. After the government rested, the government dismissed one of the counts against King and the jury returned a verdict of not guilty on the remaining count against him.

[2] This Assistant United States Attorney also prosecuted the case.

into the camper only to find that they had stopped the wrong vehicle and arrested the wrong person (JA 63). At the same time, a blue van pulled into the parking lot and, about 2:20 p.m., the agents placed its occupants—Michael F. Murray and James D. Carter—under arrest (JA 51-52, 65-66, 73-74, 88, 90). The agents then looked through the interior of the blue van and found no contraband (JA 66).

After arresting Murray and Carter at the parking lot, DEA Supervisor Garibotto and the Assistant United States Attorney quickly departed in Garibotto's car for the warehouse at 345 D Street (JA 74). They were followed by other agents (JA 67, 91-92). The warehouse was about 1.5 miles from the parking lot, a five to eight minute drive (JA 90-91). (The United States Courthouse was closer, about one mile away.)

FBI and DEA agents converged on the warehouse, a detached, one-story cinderblock building having two large overhead doors facing the street and a steel entry door on the right side of the building (JA 13, 53-55, 83).[3] The surrounding area is heavily industrialized, with many business establishments in close proximity to the warehouse (JA 89). Several agents were already at the scene. They had been keeping watch over the warehouse for several hours and had been notified that the group at the parking lot was coming (JA 49, 56, 74; note 4 *infra*).

When DEA Supervisor Garibotto arrived, he took a tire iron from his car, pried open the side door of

---

[3] Michael Murray, his brother Joseph and James Carter jointly owned the warehouse. They kept personal items there, and were the only persons who had keys to the door. There was no public access to the building. (JA 83-85).

the warehouse, which was locked, and entered at 2:45 p.m. (JA 54, 57, 74-76, 80). No one attempted to obtain a search warrant; indeed, the subject was not even discussed (JA 51-52). The DEA Supervisor decided to break into the warehouse without a warrant to protect "the evidence" because no one told him the evidence he anticipated finding would be preserved (JA 77). He admitted, however, that he had no knowledge that any evidence there might be destroyed[4] (JA 78-79).

Inside the warehouse, the agents noticed a large bay containing several vehicles (JA 76). As the agents combed the warehouse, looking under and inside the vehicles, and going through an office within the warehouse, they discovered numerous bales of marijuana (JA 68, 76), red and blue notebooks, and a tape dispenser and pens used to mark the bales, all of which were in plain view and all of which were later introduced at trial (JA 24-25, 68, 76, 93-104; Pretrial Tr. 8-53, 9-14; Trial Tr. 4-24). They found no one inside (JA 58, 60, 98).

---

[4] The FBI had kept the warehouse under constant surveillance since 1:00 p.m. (JA 49-50, 79, 82-83). At one point, an FBI agent had observed an individual in front of the warehouse (JA 56). He, along with a DEA agent who arrived at the warehouse at 2:15 p.m., continued to monitor this individual, who left the area before the break-in (JA 56, 74-75). From 2:15 p.m. until the time of the break-in, no one entered or left the building. The FBI agent and DEA agent at the warehouse during this period were in a position to observe anyone entering either through the side door or the overhead doors (JA 81-82). DEA Supervisor Garibotto spoke with these agents immediately before breaking into the warehouse (JA 74-75). The Report of Investigation prepared by the DEA agent-in-charge does not mention any individual in or near the warehouse immediately prior to the break-in (JA 26-38).

At least ten agents of the DEA and FBI and the Assistant United States Attorney entered the warehouse after the lock had been broken (JA 55, 59-60, 81). Some took only a brief tour; others made a more extensive survey (JA 68). After the entry, several more agents arrived and took turns going inside (JA 59-60, 67-68, 90-92). An agent who had been posted outside was also allowed to enter and look over the cache (Pretrial Tr. 9-8).

The agents and the Assistant United States Attorney walked out of the warehouse about 3:00 p.m. (JA 51-52, 67-68, 77, 90-91). Garibotto stationed DEA and FBI agents outside the building (JA 60, 97). Two agents took Murray and Carter to DEA headquarters (JA 60, 68, 92). One of these agents then joined two other agents at the United States Attorney's Office in the federal courthouse and met with the Assistant United States Attorney who had been with them at the warehouse (JA 58, 92).

What transpired next is not revealed in the record. Sometime during the next eight hours the agents prepared a nine page typewritten affidavit in support of a search warrant; the Magistrate issued the warrant late in the evening, at 10:35 p.m. (JA 11-12, 68-69, 92-93). The affidavit and the accompanying form recited that the affiant—Agent Keaney, who had been in the warehouse—"had reason to believe" and "probable cause to believe," based on the facts set forth in the affidavit, that marijuana and records relating to it were in the warehouse (JA 13, 22). The Magistrate, however, had no way of knowing that the agents had already forcibly entered the warehouse that afternoon. Although the affidavit went into minute detail about the day's events, it did not mention

the warrantless search of the warehouse or what the agents had already found there (JA 13-23). The decision not to tell the Magistrate was deliberate and the subject of discussions in the United States Attorney's Office (JA 69-70).

After the warrant issued, the DEA agent-in-charge radioed the agents at the warehouse. Without knowing what articles were particularly described in the warrant, the agents promptly reentered the warehouse (JA 86-87). The DEA agent-in-charge returned to the warehouse with the warrant at approximately 11:00 p.m. (JA 79, 99). That evening and the following day, the agents inventoried the contents of the warehouse and prepared a warrant return (JA 24). In addition to the articles discovered upon the warrantless entry, the return listed a man's jacket, ten $100 bills, several cans of soda and a newspaper (JA 24).

At the suppression hearing, the government admitted that it had sought a search warrant because of what the agents found in the warehouse. The Assistant United States Attorney, who participated in the warrantless search, told the district court that "as a result of the warrantless searches and the marijuana that was found pursuant to those warrantless searches, there are further warrant searches which are executed on the evening of April 6th, 1983, after an affidavit was presented to the Magistrate outlining all the factors" (JA 47).

B.
THE OPINION OF THE DISTRICT COURT

The district court, in rejecting petitioners' motion to suppress, thought either that the warrantless entry was not a search or that this earlier search of the

warehouse could be ignored because the warrant was valid. The district court held that the search warrant was not the "fruit of an illegal search" and therefore was not "vitiated by the prior warrantless entry of the warehouse" (Pet. App. 44a). In "Supplementary Findings and Ruling on Standing," entered to "complete the record," the district court also held that no defendant had standing to challenge the searches of the warehouse (Pet. App. 47a).

C.
THE ORIGINAL DECISION OF THE COURT OF APPEALS

The court of appeals held that petitioners had standing to contest the searches of the warehouse (Pet. App. 22a). Although expressing doubt that there were exigent circumstances justifying the warrantless search of the warehouse, the court passed over this issue and assumed that the search violated the Fourth Amendment (Pet. App. 24a). The court then turned to the "harder question"—whether the district court should have suppressed all evidence first discovered during this illegal search (Pet. App. 27a).

Petitioners had argued that whenever an illegal warrantless search takes place, all evidence found during that search must be suppressed regardless whether there is a later search of the same premises pursuant to a warrant. The court of appeals recognized "that lower courts presented with the present issue have decided that evidence observed in an illegal search must be suppressed" and that "[a]rguably" the Supreme Court had agreed in *Segura v. United States*, 468 U.S. 796 (1984) (Pet. App. 28a). Nevertheless, citing *Nix v. Williams*, 467 U.S. 431 (1984), the court ruled that because "the discovery of the contraband

in plain view [during the illegal search] was totally irrelevant to the later securing of a warrant and the successful search that ensued," the evidence should not be suppressed (Pet. App. 28a).

D.
THE OPINION ON THE COURT OF APPEALS ON REMAND

On petition for a writ of certiorari presenting the Fourth Amendment question and an issue under the Speedy Trial Act, this Court granted Murray's and Carter's petitions, vacated the judgment and remanded the case "for further consideration in light of *Henderson v. United States,* 476 U.S. ___."[5] On remand, the court of appeals adhered to its original decision that the Speedy Trial Act had not been violated (Pet. App. 52a-58a). Judge Coffin dissented (Pet. App. 58a-61a).

SUMMARY OF ARGUMENT

1. Petitioners rely on the firmly-established Fourth Amendment principle that articles discovered and observations made during the course of an illegal search must be suppressed. In arguing against the exclusion of such "primary evidence," the government invokes a version of the inevitable discovery doctrine that would devastate the Warrant Clause of the Fourth Amendment. Officers knowing they need a warrant would have every incentive to search first without one. Only if they found something worthwhile would

---

[5] *See Murray v. United States,* ___ U.S. ___, 106 S. Ct. 2241 (1986); *Carter v. United States,* ___ U.S. ___, 106 S, Ct, 2241 (1986); and *Rooney v. United States,* ___ U.S. ___, 106 S. Ct. 2241 (1986).

they bother to visit the magistrate. The history of the Fourth Amendment and this Court's decisions enforcing the Warrant Clause show that such a system would be intolerable.

2. Colonial opposition, particularly in Boston, to the writs of assistance served as the foundation of the Fourth Amendment. The writs authorized warrantless searches of homes, shops and warehouses, and allowed customs officers to break down doors to look for smuggled goods. The Warrant Clause was designed to interpose a neutral and detached magistrate between law enforcement officers and the public and to require officers to have authorization, in the form of a warrant, before they undertake a search. Apart from a few narrow exceptions, searches without warrants are therefore unconstitutional even though there would have been sufficient cause to convince a magistrate to issue a warrant if one had been sought.

3. The inevitable discovery doctrine recognized in *Nix v. Williams* does not support the government's position in this case. Unlike *Nix,* this case does not involve two completely independent lines of investigation, one legal and the other not, converging on the same evidence. Here the legal means—a search warrant—did not exist until eight hours after the evidence in the warehouse had been illegally discovered. Moreover, *Nix* dealt only with "derivative evidence," that is, evidence derived from exploitation of the primary illegality. The Court's statements in *Nix* about not putting the police in a worse position than they would have been in if no unlawful conduct had occurred were limited to derivative evidence. When it comes to primary evidence, found during an illegal and warrantless search, the Court has held time and

again that such evidence must be suppressed even if the police had probable cause and could have obtained a warrant.

4. The record limits what "inevitable discovery" can mean in this case. Prior to breaking into the warehouse, the agents did not plan to get a warrant. When they left the parking lot, where they had gathered, they headed straight for the warehouse although the United States Courthouse, where the magistrate sat, was closer. While the warrant affidavit did not mention the information illegally discovered in the warehouse, the agents only sought a warrant because of what they found illegally and the government so admitted during the suppression hearing.

Therefore, when the government speaks of "inevitable discovery" it can mean only that inevitably the agents would find again during the warrant-authorized "search" what they had already illegally found; and that inevitably a magistrate would issue a warrant when requested because the agents had probable cause when they broke into the warehouse. Reduced to its essentials, the government's argument is simply that whenever an unlawful warrantless search takes place, the evidence thus discovered should be admitted so long as a warrant is obtained sometime later. That contention is one the Court has flatly rejected in numerous decisions spanning more than fifty years, including *Katz v. United States* where the government argued that after-the-search warrants were sufficient under the Fourth Amendment.

5. In *Segura v. United States,* which was also a search-unlawfully-first-get-the-warrant-later case, the Court held that evidence first found during the warrant-authorized search is admissible. In so ruling, the

Court indicated that its decision would not detract from the deterrent effects of the exclusionary rule in such cases because the primary evidence—the evidence discovered during the initial illegal entry—would be suppressed, as it was by the court of appeals in *Segura.* Neither *Segura* nor *Nix* indicates that because the fruits of illegal police activity are admissible, the poisonous tree is as well, yet that is where the government's argument leads.

6. These types of cases generally have in common not only that the government has determined to conduct a search without first obtaining a warrant, but also that the government has decided intentionally to omit any reference to the illegal search when the authorization of the magistrate is eventually sought. In truly "inevitable" situations, officers will be aware that they need a warrant and will have planned to get one. Nevertheless, they proceed to search the premises without a warrant. They have every incentive to follow this unconstitutional course of conduct. If they find nothing during their illegal search, they have saved themselves the time and trouble of preparing an affidavit and presenting it to a judicial officer. If they do discover incriminating evidence, they can always put their probable cause to the test at a later time without telling the magistrate what they have already found. Such practices seriously distort the function of search warrants and the role of magistrates and are completely contrary to the Fourth Amendment. If sustained, warrants would become, not prior authorizations to search, but proof of "inevitability," exhibits to be displayed during suppression hearings to show that the officers did indeed have probable cause at the time of their illegal search. In

order to ensure that the warrant is not tainted, officers will be encouraged, if not instructed, to engage in duplicity, to omit from their affidavits the material fact of their illegal search, to claim only probable cause when they know to a certainty that the evidence is on the premises. That such a system of "confirmatory" warrantless searches will quickly take hold is apparent. It had become standard operating procedure in other jurisdictions until the courts called a halt to the practice by suppressing the evidence discovered during unlawful entries. That inevitably searches with warrants will be preceded by warrantless searches is a reason for excluding the evidence illegally discovered, not a reason for admitting it.

ARGUMENT

The factual pattern of this case has been the subject of many recent lower court opinions, both federal and state: officers find incriminating evidence during the course of an illegal search; later they proceed to a magistrate and, while keeping their earlier illegality secret, swear they have probable cause to believe such evidence is on the premises; the magistrate is convinced and the officers, now armed with a warrant, "search" again for the same evidence and, of course, find it.

The government's theory is that articles discovered and testimony about what was observed during the Fourth Amendment violation should not be suppressed because the agents inevitably would have found the same articles during their later search with a warrant. Petitioners maintain that such a notion is at odds with the decisions of this Court and with the central tenets of the Fourth Amendment; that rather

than requiring officers to obtain a warrant before conducting a search, as the Fourth Amendment demands, the government's proposal would have the opposite effect; and that after-the-search warrants cannot be used as a basis for admitting evidence that has already been illegally discovered.

I.

IN ORDER TO ENFORCE THE FOURTH AMENDMENT, PRIMARY EVIDENCE MUST BE SUPPRESSED

A.

THE EVIDENCE DISCOVERED IN THE WAREHOUSE CONSTITUTED PRIMARY EVIDENCE

As the case is presented here, there is no question that petitioners have standing to contest the searches of the warehouse.[6] It is a given that the warrantless search (or more accurately, searches[7]) of the warehouse violated the Fourth Amendment.[8] There is no

---

[6] The court of appeals so held. 771 F. 2d at 601.

[7] See discussion at pp. 30-31 *infra*.

[8] On appeal, the government sought to justify the initial search of the warehouse on the basis of exigent circumstances, that is, that "evidence would have been destroyed before a search pursuant to a warrant could have been effected." 771 F. 2d at 601-02. The record does not support the claim. The agents entered because they did not know whether evidence was in danger of being destroyed. JA 77. *But see, e.g., Segura v. United States*, 468 U.S. 796, 820 n. 5 (1984) (Stevens, J., dissenting) ("In *Vale v. Louisiana*, 399 U.S. 30 (1970), we held that absent a demonstrable threat of imminent destruction of evidence, the authorities may not enter a residence in order to preserve evidence without a warrant.").

The court of appeals passed over the issue, stating (771 F.

dispute that when the agents entered the warehouse they had probable cause and there is no doubt that when they later presented an affidavit to the magistrate (JA 15-23), they omitted any mention of their earlier entry or what they had already discovered.[9]

Our position is straight-forward and rests on the Fourth Amendment principle that "primary evidence"—articles discovered or observations made during the course of an illegal search or seizure—may not be admitted into evidence when a party with standing objects to their introduction. *See, e.g., Arizona v. Hicks,* ___ U.S. ___, 107 S.Ct. 1149 (1987); *Segura v. United States,* 468 U.S. 796, 804-05 (1984) ("Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to ex-

---

2d at 602):

> The district court made no findings on the question of exigency, and while we do not rule out all possibility that the risk of destruction of evidence inside the warehouse was so great as to allow a warrantless entry, the government's position is uphill and, absent findings by the lower court, we are loath to conclude that exigent circumstances existed as now argued. We accordingly do not reach the government's claim of exigency but turn directly, as did the district court, to the question of whether or not to suppress the evidence found in the warehouse on the assumption, *arguendo,* that the warrantless entry was in violation of the fourth amendment.

[9] As we discuss below (p. 31 *infra*) the government's actions were influenced by what it found illegally: the government decided to seek a warrant *because* of what it discovered in the warehouse and so admitted during the suppression hearing. It is therefore not correct to suppose, as did the court of appeals, that "[t]his is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of the warrant . . .." 771 F. 2d at 604.

clusion."); *United States v. Karo,* 468 U.S. 705, 714-15 (1984); *United States v. Chadwick,* 433 U.S. 1, 11-13 (1977); *Chimel v. California,* 395 U.S. 752, 767 (1969); *Wong Sun v. United States,* 371 U.S. 471, 485 (1963); *Katz v. United States,* 389 U.S. 347 (1967); *Mapp v. Ohio,* 367 U.S. 643 (1961); 4 W. La Fave, *Search & Seizure* § 11.4, at 369 (1987).

Other evidence, discovered after the primary illegality, is treated differently. The question initially is one of "taint." Is the evidence the "fruit of the poisonous tree" because it was obtained by exploiting the Fourth Amendment violation? *See Nardone v. United States,* 308 U.S. 338, 341 (1939); *Brown v. Illinois,* 422 U.S. 590 (1975).[10] Or is it untainted because it stems from a source wholly independent of the constitutional violation? *See Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920); *Alderman v. United States,* 394 U.S. 165, 183 (1969).

In this case, the court of appeals stressed that the agents' illegal discovery of evidence in the warehouse did not taint the warrant they procured eight hours later. 771 F.2d at 603. But the fact that the agents had independently acquired probable cause to obtain a warrant before they broke into the building without one relates to a different matter. Under *Segura,* this removed the taint of illegality from any evidence discovered for the first time during the warrant-authorized search. The independent basis for the warrant,

---

[10] With respect to such "derivative" or secondary evidence, there may need to be a further inquiry to determine whether the evidence was obtained " 'by exploitation of that [prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun v. United States,* 371 U.S. at 488 (citation omitted).

however, has no bearing on whether the other "primary evidence," already come upon during the initial unlawful search, must be suppressed,[11] which is the issue in this case.[12]

Because the evidence found during the break-in was in no sense "discovered by means wholly independent of any constitutional violation," (*Nix v. Williams*, 467 U.S. 431, 443 (1984)), the government must look elsewhere to support the decision below. In this Court—but not in the court of appeals—it has relied on the "inevitable discovery doctrine." In doing so, however, the government has thus far failed to confront the Warrant Clause of the Fourth Amendment. That provision is critical to this case. A ruling in the government's favor would, as many courts have recognized, emasculate the Warrant Clause and reduce "the 4th

---

[11] In *Segura*, the Court stated: "Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. Exclusion of evidence as derivative or 'fruit of the poisonous tree' is not warranted here because of that independent source." 468 U.S. at 813-14.

[12] Even the First Circuit now agrees. See *United States v. Silvestri*, 787 F. 2d 736, 740 (1st Cir. 1986), pet. for cert. pending No. 86-678, Oct. Term 1986. (By relying on inevitable discovery, the government implicitly admits the independent source doctrine does not apply. See p. 26 n.23 *infra*.)

Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. at 392.[13]

B.

THE HISTORY OF THE FOURTH AMENDMENT REVEALS THE CRITICAL FUNCTIONS OF SEARCH WARRANTS

It is fitting that the events of this case took place in Boston, that agents broke down the door of a

---

[13] *See United States v. Griffin*, 502 F. 2d 959, 961 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974) ("The assertion by the police . . . that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission . . . would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."); *United States v. Alvarez-Porras*, 643 F. 2d 54, 64 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981); *United States v. Segura*, 663 F.2d 411, 417 (2d Cir. 1981), *aff'd*, 468 U.S. 796 (1984); *United States v. Williams*, 737 F.2d 735 (8th Cir. 1984); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *United States v. Cherry*, 759 F. 2d 1196, 1205 (5th Cir. 1985); *United States v. Owens*, 782 F.2d 146, 152-53 (10th Cir. 1986); *United States v. Andrade*, 784 F.2d 1431, 1434 (9th Cir. 1986) (Reinhardt, J., specially concurring); *United States v. Echegoyen*, 799 F.2d 1271, 1280 n. 7 (9th Cir. 1986).

In the state system, *see Unger v. State*, 640 P.2d 151, 159 n.9 (Alaska 1982); *People v Cook*, 22 Cal.3d 67, 148 Cal. Rptr. 605, 583 P.2d 130, 148 (1978) (*en banc*); *People v. Barndt*, 199 Colo. 51, 604 P. 2d 1173, 1179 (1980) (*en banc*); *People v. Schoondermark*, 717 P. 2d 504, 506 (Colo. Ct. App. 1985); *State v. Badgett*, 200 Conn. 412, 512 A.2d 160 (1986); *State v. Ramos*, 405 So.2d 1001, 1002-03 (Fla. Dist. Ct. App. 1981); *State v. Cook*, 106 Idaho 209, 677 P.2d 522, 537, 539 (1984) (concurring opinion); *State v. Holman*, 109 Idaho 382, 707 P.2d 493, 503 (1985); *Spiering v. State*, 58 Md. App. 1, 472 A.2d 83, 89 (1984); *Commonwealth v. Benoit*, 382 Mass. 210, 415 N.E.2d 818, 823 (1981); *State v. Sugar*, 100 N.J. 214, 495 A.2d 90, 104 n. 3

warehouse without prior judicial authorization, that they were looking for contraband and that they were accompanied by the prosecutor. See JA 55. In colonial Boston, customs agents, accompanied by court officers holding writs of assistance, were empowered "to enter into any House, Shop, Cellar, Warehouse or any place whatsoever . . . there to make diligent Search and in case of resistance to break open any Door . . . for any Goods, Wares, or Merchandise" that had been smuggled.[14] In 1761, after the writs of assistance had expired upon the death of George II, James Otis, Jr., delivered his famous argument in a Boston courtroom against the granting of new writs.

(1985); *People v. Stith*, No. 78, slip op. at p. 7 (N.Y. Ct. App., March 26, 1987); *People v. Knapp*, 42 N.Y.2d 689, 422 N.E.2d 531, 536 (1981); *People v. Arnau*, 58 N.Y.2d 27, 444 N.E.2d 13, 18 (1982); *State v. Hansen*, 295 Or. 78. 664 P.2d 1095, 1104 (1983).

But see United States v. Silvestri, 787 F.2d 736 (1st Cir. 1986), pet. for cert. pending, No. 86-678, Oct. Term 1986; *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1497 (1986); *United States v. Salgado*, 807 F.2d 603 (7th Cir. 1986); *United States v. Whitehorn*, 813 F.2d 646, 650 (4th Cir. 1987) (acknowledging that the issue is "not free from doubt."). Unlike the cases cited above, the courts in *Silvestri*, *Merriweather*, *Salgado* and *Whitehorn* do not consider the effect of their rulings on the Warrant Clause.

[14] O. Dickerson, *Writs of Assistance as a Cause of the Revolution* 45 n. 6, in *The Era of the American Revolution (R. Morris ed. 1939); see also* N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 53 (1937) ("any person who was authorized by a writ of assistance . . . could take with him a civil officer and search any house, shop, warehouse, etc.; break open doors, chests, packages, in case of resistance; and remove any prohibited or uncustomed goods or merchandise.").

Otis declaimed the "wanton" power the writs conferred, a power "that places the liberty of every man in the hands of every petty officer."[15] That power must be restrained, Otis argued, by requiring every officer, before conducting any search, to "show probable cause," to take "his oath of it," and to "do this before a magistrate," who would then decide "if he think proper" to "issue a special warrant to a constable to search the places."[16] As John Adams wrote years later, "Then and there the child of Independence was born."[17] Then and there as well, the foundation of the Fourth Amendment was formed.[18]

---

[15] II *The Works of John Adams* 524 (C. Adams ed. 1850).

[16] *Id.* at 525. The court eventually ruled against Otis. Concern about the writs of assistance was by no means confined to Boston. The Townshend Revenue Act of 1767 "aroused in every other colony in America a similar controversy which continued down to the outbreak of hostilities." O. Dickerson, *supra*, at 48.

The justification for issuing the writs under the Townshend Act, as stated by Attorney General DeGrey of England, sounds familiar:

> But it must be observed, that if such a General Writ of Assistants is not granted to the Officer, the true Intent of the Act may in almost every Case be evaded, for if he is obliged, every Time he knows, or has received information of prohibited or uncustomed Goods being concealed, to apply to the Supreme Court of Judicature for a Writ of Assistants, such concealed Goods may be conveyed away before the Writ can be obtained.

Quincy, *Massachusetts Reports* (1761-1772), at 453.

[17] X *The Works of John Adams* 247-48 (C. Adams ed. 1850). Opposition to the writs of assistance mounted as judges in other colonies began to refuse to issue them. *See* O. Dickerson, *supra*, at 49-75. The First Continental Congress listed, in the petition addressed to the king on October 26, 1774, the following griev-

The Warrant Clause of the Fourth Amendment was, in short, "the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope." *United States v. Rabinowitz, supra,* 339 U.S. at 70 (Frankfurter, J., dissenting). Those dangers—"that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy,"[19] that the right of the people to be secure in their persons, houses, papers and effects would be left to "the discretion of police officers"[20]—are as real today as they were two hundred years ago. Professor Kenneth Culp Davis has observed that:

---

ance: "The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information." N. Lasson, *supra,* at 75.

[19] *See, e.g., Olmstead v. United States,* 277 U.S. 438, 474 (1927) (Brandeis, J., dissenting); *United States v. Rabinowitz,* 339 U.S. 56, 69-70 (1950) (Frankfurter, J., joined by Justice Jackson, dissenting); *Chimel v. California,* 395 U.S. 752, 760-61 (1969); *United States v. United States District Court,* 407 U.S. 297, 328-29 n. 6 (1972) (Douglas, J., concurring); *United States v. Chadwick,* 433 U.S. 1, 7-9 (1977); *Payton v. New York,* 445 U.S. 573, 583-84, & n. 21 (1980); *id.* at 608-09 (White, J., joined by Chief Justice Burger and Justice Rehnquist, dissenting); *Illinois v. Krull,* ___ U.S. ___, 107 S. Ct. 1160, 1174 (1987) (O'Connor J., joined by Justices Brennan, Marshall and Stevens, dissenting); Justice Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Colum. L. Rev. 1365, 1370-71 (1983).

[19] *United States v. United States District Court, supra,* 407 U.S. at 317.

[20] *Johnson v. United States,* 333 U.S. 10, 14 (1948).

> The police are among the most important policy-makers of our entire society. . . . [T]hey make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.[21]

The Framers knew this as well as anyone, which is why the Fourth Amendment requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police." *Wong Sun v. United States,* 371 U.S. 471, 481-82 (1963). This is also why the oft-quoted words of Justice Jackson for the Court in *Johnson v. United States,* 333 U.S. at 13-14, ring as true today as when he wrote them:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

---

[21] K. Davis, *Discretionary Justice* 88 (1969).

The Warrant Clause also serves the critical function of confining the ensuing search. "Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized,' " *United States v. Chadwick, supra*, 433 U.S at 9, which is what the Fourth Amendment demands. In addition, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id. See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967).

II.

THE INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY TO THIS CASE

A.

NIX DOES NOT SUPPORT THE GOVERNMENT'S POSITION

We now turn to the government's version of inevitable discovery. The government thinks *Nix v. Williams* supports it. In our view it does not.[22] As we shall show, the Fourth Amendment would, in Justice

[22] *See United States v. Satterfield*, 743 F.2d at 846 ("Except for the application of the [inevitable discovery doctrine] to the specific facts before the Court and its holding that the Government must establish the inevitability of discovery by a preponderance of the evidence, the Supreme Court [in *Nix*] was silent as to what constitutes an 'inevitable' discovery"); and *United States v. Cherry*, 759 F.2d at 1204, making the same point. *See also The Supreme Court, 1983 Term*, 98 Harv. L. Rev 87, 129 (1984).

Jackson's words, be reduced to a "nullity" if the government's theory were accepted.

Nix involved two completely independent lines of investigation converging on the same evidence—the body of a ten year old girl. After finding clues to the location of the missing girl, who had disappeared from Des Moines, Iowa, police organized a group of volunteers, who began searching in a westerly direction from Poweshiek County toward Des Moines. After the search was underway, Williams surrendered in Davenport and a detective, while transporting Williams back to Des Moines, elicited incriminating statements from him in violation of his right to counsel. Williams' statements led the detective to the body. At the time, the search party was only a few miles away and would have come upon the body if their efforts had continued.

With respect to the primary evidence—the statements elicited from Williams in violation of his Sixth Amendment right to counsel—the Court held that these must be suppressed. *Brewer v. Williams*, 430 U.S. 387 (1977). The evidence derived from that illegality, however, was another matter.

"The core rationale," the Court stated in *Nix*, "for extending the exclusionary rule to [derivative] evidence . . . is . . . to deter police from violations of constitutional and statutory protections" (467 U.S. at 442-43), but "derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct." 467 U.S. at 443. Thus when evidence "has been discovered by means wholly independent of any constitutional violation," "exclusion of such evidence would put the police in a worse position than they would

have been in absent any error or violation." 467 U.S. at 443-44.

Although the independent source doctrine did not apply in *Nix*,[23] if such derivative evidence "ultimately or inevitably would have been discovered by lawful means," it too should be admissible because "exclusion would also put the government in a worse position" than if no illegality had occurred. *Id.* at 444. The Court thought that recognizing an inevitable discovery rule would not encourage unconstitutional police conduct because "a police officer faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought to be introduced would inevitably have been discovered"; even if an officer were in such a position, the Court reasoned, he would refrain from engaging in "dubious 'shortcuts' to obtain the evidence." *Id.* at 446.

The reasoning of *Nix* does not apply to search-unlawfully-first-get-the-warrant-later cases. There is no factual similarity between *Nix* and this case, which by no stretch of the imagination involves two independent lines of investigation, one legal and the other not, converging on the same evidence.[24] The legal

---

[23] The independent source "doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to [the detective] indeed led the police to the child's body . . . ." *Nix v. Williams, supra,* 467 U.S. at 444.

[24] The courts in *Satterfield* (743 F.2d at 846) and *Cherry* (759 F.2d at 1204-06) held that the inevitable discovery doctrine applies in a case such as this "only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred." 743 F.2d at 846. With respect to searches, the lawful means is a warrant. *Id.*

means of discovering the evidence in this case was not put in place until eight hours after the illegal search. Moreover, *Nix* dealt only with derivative evidence, the fruits of illegal conduct, and the Court's statement about not putting the government in a worse position because of police misconduct was carefully limited to that subject. In discussing the inevitable discovery doctrine in that context, the Court in *Nix* did not remotely suggest that because the fruits of illegality might be admitted, the poisonous tree should be as well. *See People v. Stith,* No. 78, slip op. at pp. 5-7 (N.Y.Ct.App., March 26, 1987). When it comes to excluding the direct products of warrantless searches based on probable cause, searches which by definition could have been lawfully conducted, there is "not merely 'a page of history,' . . . but a whole volume,"[25] showing why the government should indeed be put in a worse position than if it had complied with the Fourth Amendment.

Nix itself ultimately rested on the Court's judgment that the deterrent effects of the exclusionary rule reach the point of diminishing returns when, unknown to the officers engaging in illegal conduct, a separate and independent line of lawful investigation would have come upon the same evidence. Only a major distortion of *Nix* and the reasoning behind it could convert the situation here into one of "inevitable discovery." To admit the evidence in question not only would unleash law enforcement officials from the constraints of the Warrant Clause of the Fourth Amendment, but also would transform the role of the

---

[25] *Galvan v. Press,* 347 U.S. 522, 531 (1954), quoting *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

magistrate from one of substance to one of mere formality.

B.

BY "INEVITABLE DISCOVERY" THE GOVERNMENT MEANS ONLY THAT PROBABLE CAUSE EXISTED BEFORE THE UNLAWFUL SEARCH

With respect to the evidence found illegally in the warehouse,[26] one must be precise about exactly what is meant by "inevitable discovery." The government has offered two different explanations: (1) "the marijuana would inevitably have been discovered pursuant to the warrant search"[27]; and (2) "[r]egardless of whether the officers had made the warrantless entry or observed the marijuana, they would inevitably have obtained the warrant and discovered the bales in the course of a lawful search."[28]

The government's first formulation is specious. Of course agents who illegally discover an article, impound it or surround it and only then get a warrant to search for what they have already found, will "find" it again. That is the nature of search-unlawfully-first-get-the-warrant-later cases. By focusing on what happened after the illegal search, the government diverts attention from the question whether, before the agents first entered the warehouse, it was inevitable that they were going to search it with a warrant, that is, lawfully.[29] See pp. 39-46 *infra*. But there is more to it than that. Disguised in the garb of "inevitability" a legal principle is suggested—that the exclusionary rule should not apply whenever a search takes place without a warrant so long as the officers eventually get one. But see cases discussed at pp. 32 to 35 *infra*.

[26] That is, the bales of marijuana on the floor and in the vehicles (JA 68, 76), the markers and tape dispensers resting on the bales (JA 24-25, 104), and the red and blue notebooks on the hoods of the trucks (JA 103-04; Pretrial Tr. 9-14; Trial Tr. 4-19 - 4-20).

[27] Brief for the United States in Opposition, Nos. 86-995, 86-1016, Oct. Term 1986, at p. 12.

[28] Brief of the United States in Opposition, Nos. 85-1105, 85-1118, 85-1120, Oct. Term 1985, at p. 14.

The government's second explanation of what it means by inevitable discovery differs from the first in one respect. It contains the additional point that regardless of the illegal search, the agents "would inevitably have obtained the warrant." The statement is ambiguous. There are at least three possible interpretations: (1) at the time the agents were breaking down the warehouse door, they were planning to get a warrant and, therefore, it was "inevitable" that they would do so; (2) the fact that the agents had probable cause proves that "inevitably" they were going to seek a warrant; or (3) the fact that the agents' had probable cause shows that "inevitably" a magistrate would issue a warrant when one was sought.

[29] It is as if, in *Nix*, the same detective who found the body after illegally questioning Williams left it there and only then organized a search party to look for it. *See United States v. Satterfield*, 743 F.2d at 846, holding that the "Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable;" and *United States v. Cherry*, 759 F.2d at 1206, holding that the government must have been "actively pursuing a substantial alternate line of investigation at the time of the constitutional violation."

The record limits what "inevitable discovery" can mean in this case. When the agents rushed out of the parking lot on Northern Avenue on that Wednesday afternoon, they had two choices. Knowing that two of their colleagues were already watching the warehouse, they could have headed for the United States Courthouse, which was only a mile or so away, and sought a search warrant with the help of the Assistant United States Attorney who was with them. Instead of taking that constitutionally-required course, they drove straight to the warehouse at 345 D Street, which was nearly the same distance from the parking lot as the courthouse—a mere 5 minutes away. JA 90-91. Their actions vividly demonstrate what they intended and the testimony at the suppression hearing confirms as much. Before leaving the parking lot for the warehouse, they did not even discuss obtaining a search warrant.[30]

DEA agent Garibotto, after applying his tire iron to the door, entered first. At least nine other DEA and FBI agents and the Assistant United States Attorney followed. JA 55, 57-58. Some of these agents stayed inside for only a short period; others stayed longer. JA 68. After about 10 to 15 minutes, still other agents began arriving at the warehouse and

[30] It must have been out of frustration that the agents departed so quickly. At the parking lot, they had stopped a green camper and arrested its occupants only to find that it contained no contraband and that they had arrested the wrong people. When petitioners then arrived, the agents put them under arrest, looked through their vehicle and again came up empty-handed. JA 63, 66. Compare Justice Jackson's remarks in *Johnson* about officers "engaged in the often competitive enterprise of ferreting out crime." 333 U.S. at 13-14.

took turns going in and out to view the discovery. JA 59-60, 67-68, 90-91. Another agent, who had been stationed outside, was also given his chance to look at what the others had found. Pretrial Tr. 9-8.

The idea of getting a warrant arose only after the agents and the prosecutor had illegally entered the building and taken their tours of the premises. Indeed, the government admitted as much during the suppression hearing. The prosecutor, who knew as well as anyone what occurred because he was there, conceded that "*as a result of the warrantless searches and the marijuana that was found pursuant to those warrantless searches,* there are further warrant searches which are executed on the evening of April 6th, 1983, after an affidavit was presented to the Magistrate outlining all the factors."[31] JA 47 (emphasis added).

The agents thus sought a warrant only because they had found incriminating evidence in the warehouse. If the cupboard had been bare, if the warehouse had been completely empty, they simply would not have bothered. When the government says that "[r]egardless of whether the officers had made the warrantless entry or observed the marijuana, they would inevitably have obtained the warrant," it can mean one thing and one thing only—that when the agents were breaking into the warehouse they had probable cause and, if had they first gone to a magistrate, a warrant surely would have issued. But that claim, as a basis for admitting the evidence, shatters

[31] The affidavit of course did not "outline all the factors." It failed to mention the warrantless search and what was found.

against more than fifty years of Fourth Amendment jurisprudence.

C.

A WARRANT OBTAINED AFTER AN ILLEGAL SEARCH DOES NOT RENDER THE EVIDENCE ALREADY DISCOVERED ADMISSIBLE

In *Silverthorne,* Justice Holmes followed his famous dictum about independent source by holding that "the rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way" (251 U.S. at 392). *Silverthorne* is far from the only case in which this Court has considered the argument, which the government makes here, that evidence should be admitted because officers could have discovered it in a "lawful way." The DEA agents in *United States v. Karo,* 468 U.S. at 718, had probable cause to monitor the beeper in the defendants' residence. The police in *Arkansas v. Sanders,* 442 U.S. 753, 756 (1979), were quite sure that Sanders' suitcase contained marijuana. The narcotics agents in *United States v. Chadwick,* 433 U.S. at 3, knew almost to a certainty that the footlocker contained contraband. The FBI agents in *Katz v. United States,* 389 U.S. at 354, clearly had probable cause to conduct electronic surveillance of Katz's gambling transactions. In each of these cases, in *Vale v. Louisiana,* 399 U.S. 30 (1970), in *Chimel v. California, supra,* in *Mapp v. Ohio, supra,* in *Jones v. United States,* 357 U.S. 493 (1958), in *United States v. Jeffers,* 342 U.S. 48 (1951), in *Johnson v. United States,* 333 U.S. 10 (1948), law enforcement officers had sufficient information to convince a magistrate to issue a warrant, yet conducted warrantless and

illegal searches. In each case, the Court held that the evidence found in violation of the Fourth Amendment must be suppressed.

This case differs, it might be argued, because here the government actually obtained a warrant after its illegal search. But that had only two consequences: it tended to confirm that probable cause existed and it authorized the government to search for and introduce at trial evidence that remained undiscovered during the warrantless search. The warrant did not, as the government contends, sanction the government's introduction of what it had already found during the illegal search. This Court has rejected the argument that after-the-search warrants render the evidence already gathered admissible.

In *Katz v. United States,* 389 U.S. at 358-59, the government maintained that so long as the search—in that case, electronic eavesdropping—was based on probable cause, it should be sufficient if the agents obtain a warrant after conducting their search without one. The Court answered: "Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' Beck v. Ohio, 379 U.S 89, 96." 389 U.S. at 358. Moreover, "bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' Id. at 97." *Ibid.* (emphasis in original). As in this case, the "government agents . . . ignored 'the procedure of antecedent justification . . . that is central to the

Fourth Amendment.' " *Ibid.* (quoting *Osborn v. United States*, 385 U.S. 323, 330 (1966)).

The Court addressed the argument again in *United States v. United States District Court, supra*, the "domestic security" wiretapping case. Again the Court rejected it. In response to the government's contention that it should be permitted to search first and obtain judicial review later, the Court held that the "Fourth Amendment contemplates a prior judicial judgment," that "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights," and "that the Government's concerns do not justify departure . . . from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance." 407 U.S. at 317-18, 321.

Katz and *United States District Court* thus firmly reject after-the-fact judicial approval of searches. The point of both decisions is that a warrant issued after the search will not be given some *nunc pro tunc* effect, that evidence discovered without a warrant and therefore in violation of the Fourth Amendment will be suppressed, as it should have been in the case now before the Court.

The Court's more recent decision in *United States v. Karo, supra*, also lays to rest any notion that an illegal search followed by a "search" with a warrant will result in the admission of the evidence first discovered. The Court held that the government's monitoring of its electronic device in a home "reveal[ed] a critical fact about the interior of the premises that the Government is extremely interested in knowing and could not have otherwise obtained without a warrant." 468 U.S. at 715. The monitoring therefore con-

stituted a search within the meaning of the Fourth Amendment. 468 U.S. at 718. As such, a valid warrant was required and since the government had none, the "information . . . obtained without a warrant . . . would therefore be inadmissible at trial against those with privacy interests in the house" (468 U.S. at 719). However, since the government later got a warrant to search the house and since the warrant was not tainted by the information gleaned from monitoring of the beeper, the evidence gathered from that search was admissible. 468 U.S. at 720-21. In other words, when an illegal warrantless search is followed by a warrant-authorized search of the same premises, which is the situation in this case, the evidence illegally found must be excluded.

D.

SEGURA IS AGAINST THE GOVERNMENT'S POSITION IN THIS CASE

This brings us to *Segura v. United States*, 468 U.S. 796 (1984), decided shortly after *Karo* and *Nix*. The precise issue in *Segura* was "whether the evidence first discovered during the search of the apartment pursuant to a valid warrant issued the day after the search should have been suppressed as 'fruit' of the illegal entry." 468 U.S. at 798. In considering this question the Court assumed that the warrantless entry violated the Fourth Amendment (468 U.S. at 798):

> The Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to

question the courts' holding that that *search* was illegal.

See also 468 U.S. at 828, 831 n. 25 (Stevens, J., joined by Justices Brennan, Marshall and Blackmun, dissenting). The Second Circuit, faced with the question presented here, had upheld "the suppression of such evidence as was discovered upon the unlawful entry" in light of "the potential for abuse" that a contrary ruling would generate. 663 F. 2d 411, 417 (2d Cir. 1981).

In *Segura*, the Court therefore carefully distinguished between "primary evidence," that is, the evidence discovered during the illegal search,[32] and "derivative evidence" found only later.[33] With respect to the latter type of "evidence subsequently obtained," the Court ruled that it should not be excluded if the warrant is obtained without relying on what was found during the illegal search. In such circumstances, the information possessed by the agents before their illegal search and on the basis of which they obtained a warrant, constituted an "independent source" for the discovery and seizure of the challenged evidence, which removed it from the category of "fruit of the poisonous tree." 468 U.S. at 813-14.

In so holding, the Court majority in *Segura* emphasized that "[e]vidence obtained as a direct result

---

[32] That is, "a triple-beam scale, jars of lactose, and numerous small cellophane bags, all accouterments of drug trafficking." 468 U.S. at 801.

[33] "In the search pursuant to the warrant, agents discovered almost three pounds of cocaine, 18 rounds of .38-caliber ammunition fitting the revolver agents found in Colon's possession apt the time of her arrest, more than $50,000 cash, and rpecords of narcotics transactions." 468 U.S. at 801.

of an unconstitutional search or seizure is plainly subject to exclusion," while evidence later discovered pursuant to a warrant must be subjected to the "fruit of the poisonous tree" analysis. 468 U.S. at 804. Chief Justice Burger, writing for himself and Justice O'Connor, made the same point by noting that the Court's ruling would not detract from the deterrent effects of the exclusionary rule because "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." 468 U.S. at 812. There is simply no way to reconcile the decision below with *Segura's* reaffirmation of what has been the governing rule since *Weeks v. United States*, 232 U.S. 383 (1914), and with the central principle of the Fourth Amendment that there must be a prior authorization to search in the form of a warrant.

Neither *Segura* nor *Nix* concerned primary evidence found during the illegality. Both decisions took as a given that such evidence should be suppressed and then proceeded to address the question whether any additional deterrence was needed by suppressing the derivative evidence[34]—in *Segura* the material found for the first time during the warrant search, in *Nix* the body found as a result of illegal questioning. Whether the exclusionary rule should be eliminated altogether in cases such as this one, which is where the government's position leads, is at the heart of the matter.

---

[34] This is why Chief Justice Burger in *Segura* could reaffirm for the Court—without mentioning his earlier opinion in *Nix* — that evidence discovered as a "direct result" of a search in violation of the Fourth Amendment must be suppressed.

III.

TO APPLY THE INEVITABLE DISCOVERY DOCTRINE HERE WOULD BE TO INVITE WARRANTLESS SEARCHES IN VIOLATION OF THE FOURTH AMENDMENT

Two elements present in nearly all search-unlawfully-first-get-the-warrant-later cases are present here. The first is that the officers have determined not to get a warrant before conducting their search.[35] The second is that when they eventually present their request for a warrant to the magistrate, they intentionally omit any mention of their earlier search.[36]

---

[35] Without explaining why the distinction mattered, the government had supported the decision below on the basis that the illegal search was "brief" and not a "full-blown warrantless search." Brief for the United States in Opposition, Nos. 86-995, 86-1016, Oct. Term 1986, at p. 21. But see the facts recited pp. 5-6, 30-31 *supra*.

We do not anticipate seeing that distinction again now that the Court has decided *Arizona v. Hicks*, ___ U.S. ___, 107 S. Ct. 1149, 1153, (1987) ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."); *id.* at 154 ("We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a 'full-blown search.' ").

[36] In its Brief in Opposition in *Silvestri*, No. 86-678, Oct. Term 1986, at p. 8, the government seemed to think it important that the evidence allegedly was not "seized" until the agents returned with a warrant. Not even the First Circuit agreed with that proposition. *See United States v. Silvestri, supra*, 787 F. 2d at 741 (upon the illegal entry, the evidence was "illegally seized and the warrant did not effectuate a legal seizure."). At all events, the government has yet to say why that makes a difference. The inevitable discovery doctrine does not turn on it; the evidence in *Nix* itself was in fact seized as a result of the

Both of these factors entail some degree of deliberateness and the second, especially, constitutes an implicit recognition that the initial search was or might have been unconstitutional. That must be the motivation behind even seeking a warrant after the search. That must also be the reason why officers, knowing with absolute certainty that the evidence is on the premises, would swear in their affidavits only that they have probable cause to believe it may be found there.

Indeed, in a case where a warrant-authorized search is inevitable in any meaningful sense it generally will be such because the officers have deliberately violated the Fourth Amendment.[37] If, at the time of the illegal

---

illegality.

Moreover, whether officers carry items out of the premises or "secure" the articles before getting a warrant is totally within their control and has nothing to do with "inevitability." Suppose, for example, that agents illegally enter a home, read a half-completed ransom note in a typewriter and then get a warrant while other agents stand by, in the house or outside. We see no difference under the Fourth Amendment between that situation and one in which the agents simply pluck the note out of the typewriter the moment they first see it. In both cases, the object and the illegal observations of it must be suppressed. (We do not suppose the government would argue that the item can be admitted although the agents' testimony about where they illegally found it cannot be.) *See Arizona v. Hicks, supra*, 107 S. Ct. at 1154 (refusing to hold that "even though probable cause would have been necessary for a *seizure*, the *search* of objects in plain view . . . could be sustained on lesser grounds.").

[37] The First Circuit in *Silvestri*, 787 F. 2d at 744-46, missed the point when it suggested that the main concern in these cases is whether the warrant is truly inevitable and when it stated that "a requirement that probable cause be present prior to the illegal search ensures both independence and inevitability for the

search or even shortly before, the agents intended eventually to get a warrant, they must have realized that the Fourth Amendment required one if they were to enter the premises.[38] The fact that they entered anyway, that they kicked in a door without a warrant, that they searched with no restriction or judicial supervision, proves that their violation of the Fourth Amendment was purposeful.[39]

If such a procedure were sustained and evidence illegally discovered admitted, suppression hearings in future search-illegally-first-get-the-warrant-later cases will follow the same script:

> PROSECUTOR: Mr. Agent, when you proceeded to the premises, what did you have in mind?
>
> AGENT: I knew that in order to conduct a search, I would need a warrant.
>
> PROSECUTOR: Did you plan to get a warrant?
>
> AGENT: Yes I did.

---

prewarrant search situation." The main concern is with the effect on the Warrant Clause and its requirement that there be prior authorization to search. The requirement that probable cause exist before the illegal search does not alleviate that concern in the slightest.

[38] The fact—or more accurately the assumption (787 F. 2d at 745)—emphasized by the government in its Brief in Opposition in *Silvestri*, at p. 9, that the police there "decided to obtain a warrant" before they searched without one thus makes the case for suppression all the more compelling.

[39] In many of these cases, including this one, the government attempts to justify the search without a warrant on the basis of exigent circumstances, which undercuts any notion that inevitably the premises were going to be searched with a warrant.

> PROSECUTOR: What information did you have at that time?
>
> AGENT: I had been told by a dozen reliable informers that Mr. Defendant had a cache of smuggled merchandise in his house.
>
> PROSECUTOR: When you arrived at Mr. Defendant's house, what did you do?
>
> AGENT: I kicked in the door, entered with my gun drawn, looked around and saw smuggled merchandise.
>
> PROSECUTOR: How long did you remain in the premises?
>
> AGENT: I exited after only a few minutes. I then stationed my deputy outside the door, and proceeded to your office where I swore out an affidavit, which we presented to Mr. Magistrate. I should add that I did not tell His Honor that I had already been in the house.
>
> PROSECUTOR: And he issued the warrant?
>
> AGENT: Yes.
>
> PROSECUTOR: What did you do then?
>
> AGENT: I went back to Mr. Defendant's house and removed the goods.
>
> PROSECUTOR: Just to be clear, was it always your intention eventually to seek a warrant?
>
> AGENT: Absolutely.

When agents of the FBI or the DEA or state or local police break down the doors of homes or shops or warehouses without warrants and then proceed to

the prosecutors' offices with news of what they have uncovered, they will be advised to seek a warrant and find again what they have already found. They will also be instructed not to reveal to the magistrate what they have done. A new euphemism for violations of the Fourth Amendment will be born. There will be "confirmatory" searches, entries just to make sure that what is expected to be on the premises is in fact there. This will doubtless save the police a good deal of trouble[40] and it will reduce the workload of magistrates. It will also destroy the Warrant Clause of the Fourth Amendment and pervert the critical decision-making role of magistrates under that constitutional provision. Warrants would no longer function as prior authorizations to search, as the Framers intended, but as exhibits to be held up as proof of inevitability. For their part, law enforcement officers will be encouraged, indeed instructed, to engage in duplicity when they swear out search warrant affidavits, to omit the material fact that they have already entered the premises and have certain, not probable, cause that the evidence is there.[41] Compare

---

[40] Officers will have everything to gain and nothing to lose by searching illegally first and then seeking a warrant. As we have discussed, if their initial illegal entry turns up nothing, they will have saved themselves the time and trouble of preparing an affidavit and presenting it to the magistrate. On the other hand, if they do find something but the magistrate determines that probable cause is lacking, the officers will have lost nothing because they would not have been able to enter legally anyway.

[41] Such a system is at odds with this Court's recent decisions in *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Shepard*, 468 U.S. 981 (1984); and *Illinois v. Krull*, ___ U.S. ___, 107 S. Ct. 1163 (1987), which recognize the importance of search warrants and allow evidence discovered pursuant to a

Olmstead v. United States, 277 U.S. at 485 (Brandeis, J., dissenting)("In a government of laws, the existence of government will be imperilled if it fails to observe the laws scrupulously.").

The experience in California and Colorado illustrates the point. In *Krauss v. Superior Court*, 5 Cal.3d 418, 96 Cal. Rptr. 455, 487 P. 2d 1023 (1971), the California Supreme Court held in a 4 to 3 decision, much as the First Circuit held in this case, that evidence found during an illegal warrantless search and seized after the police obtained a warrant was admissible because "the magistrate's independent decision to issue the warrant was in no way tainted by the officer's illegal observations, for the magistrate was wholly unaware of such observations." *Id.* at 422-23, 96 Cal. Rptr. at 458, 487 P. 2d at 1026. The dissenters in *Krauss* warned that the majority's ruling would have the effect of encouraging law enforcement officials to make unlawful "confirmatory" searches. The conclusion was, the dissenters believed, "inescapable" that "the search-unlawfully-first-obtain-the-warrant-later procedure would totally undermine the purposes of the exclusionary rule. By holding that a search warrant subsequently obtained on the basis of probable cause insulates the prior unlawful search, the majority provide profit for the unlawful search, thus violating the principle of deterrence on which the exclusionary rule is based, and we may expect that many officers will engage in unlawful searches in violation of the constitutional guarantees to determine whether their information is correct or not before seeking a

---

defective warrant to be admitted so long as the police, acting in objective good faith, relied on the warrant.

warrant." *Id.* at 426, 96 Cal. Rptr. at 461, 487 P. 2d at 1029.

Seven years later, *People v. Cook*, 22 Cal. 3d 67, 148 Cal. Rptr. 605, 583 P. 2d 130 (1978), confirmed the accuracy of what the *Krauss* dissenters had written. The prosecutor in *Cook*, who had taken part in the warrantless and unlawful search of a home, "claimed the absolute right to do so under the authority of *Krauss*," and contended that this was a "commendable police technique" for the purpose of "confirming" the observations of an informant before the police went to the magistrate and obtained a warrant. 583 P.2d at 147.[42]

The California Supreme Court, sitting *en banc*, found the prosecutor's "admission that he joined the police in conducting a warrantless incursion into defendant's house . . . nothing less than alarming." 583 P. 2d at 147. *Krauss* had given "prosecutors and the police both the authority and the incentive to engage in illegal 'confirmatory' searches before applying for warrants." *Id.* Because—inevitably—searches with warrants were being preceded by illegal "confirmatory" searches, the California Supreme Court overruled *Krauss*.[43]

---

[42] In *Cook*, the court assumed that the affidavit supporting the warrant was not tainted by the illegal entry. 583 P.2d at 147 n. 17.

[43] What the court stated in *Cook* fully applies here (583 P.2d at 148):

> After *Krauss*, a police officer need not rely solely on lawfully obtained probable cause; he can instead achieve 'certain cause' by conducting an unlawful confirmatory search, thus saving himself the time and trouble of obtaining and executing a warrant if he does not find the evidence. He can safely engage in this conduct because *Krauss* teaches him that if the evidence does turn up in the course of the illegal search, he will still be allowed to seize it later in a second 'search' under color of a warrant. The latter prospect gives him strong incentive to proceed with the warrantless entry. Yet every time he fails to find the suspected evidence, he has also invaded the privacy of a citizen innocent of any wrongdoing.

Colorado has had the same experience. In *People v. Barndt*, 199 Colo. 51, 604 P. 2d 1173 (1980), the Colorado Supreme Court, sitting *en banc*, addressed the question presented here and ruled that evidence found during the initial illegal search must be suppressed while evidence discovered for the first time during the search pursuant to the warrant could be admitted. 604 P. 2d at 1176.[44] Justice Erickson, concurring and dissenting, pointed out that the "fact situation" before the court was far from unusual: "At the suppression hearing the police officers conceded that searches such as they made in this case were standard procedure." 604 P. 2d at 1179. Justice Erickson added that "[w]hat was not stated, however, was that such practices will continue as long as the

---

[44] The facts of *Barndt* are as follows. Two undercover agents went to defendant's home, knocked on the door, told him to come outside and, when he did so, placed him under arrest. 604 P.2d at 1174. The officers then kicked open the locked door of defendant's house and walked in, looking in all the rooms and closets. "While in the house they saw, but did not seize, what they suspected to be marijuana and cocaine." *Id.* After stationing one agent at the door, the officers left with the defendant and, three hours later, procured a search warrant, returned to the house and "seized drugs and drug paraphenalia, some of which had not been seen during the initial search." *Id.*

officers feel that they can avoid the Fourth Amendment warrant requirement with impunity." *Id.*

In the final analysis the government's "inevitable discovery" argument in this case represents nothing more than a rewording of the discredited concept that officers may search without *prior* judicial approval so long as they could have satisfied the requirements for a warrant. With respect to evidence illegally discovered during the warrantless search, the later issuance of a warrant tends to show only that probable cause did exist when the unlawful search occurred, a proposition this Court has accepted time and again in its decisions enforcing the Warrant Clause of the Fourth Amendment and suppressing evidence found in violation of that constitutional provision. That inevitably searches with warrants will be preceded by warrantless and illegal searches is a reason for suppressing the evidence illegally discovered, not as the government contends and as the court below held, a basis for admitting it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
EVAN MILLER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Counsel for Petitioners

RESPONDENT'S

BRIEF

Nos. 86-995 and 86-1016

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether evidence seized pursuant to a valid warrant, which inevitably would have been sought and issued even if the evidence had not previously been seen during a warrantless search, should be suppressed as a sanction for the prior warrantless search.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-995

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1016

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 52a-61a)[1] is reported at 803 F.2d 20. The order denying a petition for rehearing (Pet. App. 62a-64a) is unreported. The original opinion of the court of appeals (Pet. App. 1a-31a),

[1] "Pet. App." refers to the appendix to the petition in No. 86-995.

as modified (Pet. App. 50a-51a), is reported at 771 F.2d 589. The orders of the district court (Pet. App. 32a-48a; 86-1016 Pet. App. 44a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 65a) was entered on October 7, 1986. A petition for rehearing was denied on October 31, 1986 (Pet. App. 62a-64a). The petition for a writ of certiorari in No. 86-995 was filed on December 17, 1986. The petition in No. 86-1016 was filed on December 20, 1986. The petitions were granted on March 9, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on one count of conspiracy to possess more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. Each was sentenced to four years' imprisonment and fined $15,000. The court of appeals affirmed. Following the decision in *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), this Court vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Henderson* (Nos. 85-1105 and 85-1118 (May 27, 1986)). On remand, the court of appeals affirmed petitioners' convictions.

1. The evidence developed at the suppression hearing showed that the FBI learned from three informants that petitioner Murray and his brother Joseph were involved with others, including co-defendants John Rooney and Arthur Barrett, in a large-scale marijuana importation and distribution network. Consequently, in July 1982 agents commenced surveillance of the suspects' activities, verified their regular association, and learned from other informants that they maintained a warehouse somewhere in South Boston in which they stored marijuana. 3 Tr. 3-5.

On April 5, 1983, the agents saw Rooney meet with Barrett in a restaurant parking lot in South Boston. The two men then drove to a house at 15 Sylvester Road in Dorchester, Massachusetts, where Rooney backed his truck up to the garage. Rooney and Barrett then drove back to Boston in Barrett's car. 2 Tr. 19-24; 3 Tr. 26.

At 11 a.m. the next day, the agents saw Rooney and Barrett sitting in Barrett's car, which was parked next to Rooney's truck on a street in South Boston. Approximately half an hour later, petitioner Murray was seen backing Rooney's truck into the street. Rooney stayed behind in Barrett's car. At 11:50 a.m., Murray and an unidentified passenger returned in Rooney's truck and parked it next to Barrett's car. A few minutes later, Rooney drove the truck to 15 Sylvester Road, followed closely by Barrett. Rooney backed the truck up to the garage at the end of the driveway as he had done the previous day. Rooney and Barrett then positioned a cardboard box and a dresser on either side of the end of the truck, thereby obstructing any view into the garage. At 12:41 p.m., Rooney and Barrett departed from the Sylvester Road garage in the truck and Barrett's car. After some evasive driving, they rendezvoused in a parking lot on Northern Avenue in South Boston. 2A Tr. 5-10; 3 Tr. 9-18; 8 Tr. 4-6.

Shortly after 1 p.m., the agents saw petitioners in the restaurant parking lot where Rooney and Barrett had met the day before. They were seen talking with

Stephen King, who was driving a red Jeep. A few minutes later, petitioners met with Rooney and Barrett at the Northern Avenue parking lot. Murray then drove Rooney's truck, and Carter drove a green Dodge camper, to a warehouse at 345 D Street in South Boston. At 1:45 p.m., the large overhead doors of the warehouse opened, and both vehicles entered. The overhead doors were immediately pulled down and closed. 2A Tr. 12-13; 3 Tr. 18-20; 6 Tr. 4-5 (Powers).

At 2:05, the overhead doors reopened, and the truck and the green camper left the warehouse. Agents who were conducting surveillance could see two men inside the warehouse. One man quickly pulled down the overhead doors. The other man was crouching in the back of the warehouse. The agents also saw a tractor-trailer rig inside the warehouse with a long dark container on top. Murray and Carter drove the two vehicles back to the Northern Avenue parking lot. Murray then exchanged a set of keys with Rooney, who entered the truck and drove it away. 3 Tr. 22; 4 Tr. 30; 6 Tr. 6-9 (Powers). Moments later, co-defendant Christopher Moscatiello entered the green camper and drove it a short distance away, where he waited until Stephen King arrived in his Jeep. The Jeep and the camper then headed in tandem for the Massachusetts Turnpike. At 2:25, the Jeep and the green camper were stopped by agents at a toll plaza on the Turnpike, and King and Moscatiello were arrested. As one of the agents pulled the camper to the side of the road, he noticed a burlap-covered bale in the camper compartment. He immediately radioed other agents that the camper had been stopped and that it was apparently loaded with marijuana. 3 Tr. 24; 4 Tr. 18; 6 Tr. 17, 27 (Powers).

At 2:30, Rooney was arrested as he backed his truck into the driveway at 15 Sylvester Road. One of the agents detected the odor of marijuana coming from the truck. Using Rooney's keys, the agent opened the rear of the truck and found 60 bales of marijuana there. He broadcast that discovery to the other agents. 8 Tr. 15-21. Shortly thereafter, Barret arrived at the Sylvester Road garage, where he was arrested (*id.* at 21).

After the agents who were watching petitioners learned that the truck and the camper were loaded with bales of marijuana, they arrested petitioners. Following petitioners' arrests, an agent was sent back to the D Street warehouse to conduct surveillance. When the agent arrived, he saw a man with work gloves in his back pocket standing in front of the warehouse. The man walked to the corner and looked down the street. He then returned to his original position. Shortly thereafter, the man again walked to the corner and looked down the street. The man appeared agitated. The agent conducting surveillance then drove around the block. When he returned, the man was gone. 2A Tr. 21-23; 3 Tr. 25-30; 4 Tr. 36-38; 5 Tr. 21; 6 Tr. 11-12 (Garibotto).

At 2:40, several agents converged on the warehouse where the truck and the camper apparently had been loaded. The agents walked around the warehouse looking for windows that would give them a view into the building, but they found none. They then knocked and announced their presence several times. They opened a mail slot and again urged anyone within to open the door. No one replied, but the agents could smell a strong odor from within. DEA Supervisor Garibotto then forced open a door with a tire iron. He and several other agents entered the

warehouse with guns drawn "'in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence.'" Pet. App. 42a. During a three- to five-minute period, the agents looked throughout the warehouse for persons. They found none, but they saw in plain view four trucks and numerous bales that they suspected contained marijuana. They also saw an open can of soda sitting next to an unwrapped but uneaten sandwich. At the end of the protective sweep, Supervisor Garibotto ordered everyone to leave the warehouse. The agents closed the doors of the warehouse and did not reenter until a warrant was obtained. 3 Tr. 30-34, 47; 5 Tr. 34-36; 6 Tr. 13-17 (Garibotto).

Following the protective sweep, some agents continued to maintain surveillance of the warehouse. Others took petitioners and their associates to DEA headquarters for processing. After the processing was under way, some of the agents began to prepare affidavits in support of warrants to search the warehouse, the garage at 15 Sylvester Road, and the green camper. 3 Tr. 34; 4 Tr. 47-48; 5 Tr. 36-37. In their applications for the warrants, the agents did not mention the warrantless entry into the warehouse, and they did not make use of any information they had obtained as a result of that entry. J.A. 15-23. A warrant authorizing a search of the warehouse was issued at 10:40 p.m. It was immediately executed and resulted in the seizure of approximately 270 bales of marijuana, each of which had been marked with tapes bearing numbers. The agents also seized notebooks listing customers whose names corresponded with the numbers on the bales. J.A. 24-25.

2. Before trial, petitioners and their co-defendants moved to suppress the marijuana and other evidence that had been seized from the D Street warehouse, the Sylvester Road garage, the green camper, and Rooney's truck. After making detailed findings of fact (Pet. App. 35a-43a), the district court concluded that the defendants had been lawfully arrested and the vehicles lawfully seized. Relying solely on the information that was known to the agents before their warrantless entry into the D Street warehouse, the court also found that the warrants authorizing the searches of the warehouse, the garage, and the camper were supported by probable cause (*id.* at 43a-47a). With respect to the D Street warehouse, the court refused to invalidate the warrant simply because the agents had not informed the magistrate about the warrantless security sweep. As the court explained, "[t]he omission of information regarding the earlier entry into the warehouse from the warrant affidavit was not a false statement, and it did nothing to 'enhance the contents of the affidavit,' * * * or to deceive the magistrate into granting the warrant" (*id.* at 45a (citation omitted)). With respect to petitioners' argument that the warrantless entry into the warehouse was unlawful and vitiated the subsequent seizure of the bales pursuant to the search warrant, the court ruled that, even if the warrantless entry was unlawful, the warrant was not tainted because it was not issued on the basis of any information learned by the agents during the protective sweep (*id.* at 44a). The court found in any event that none of the defendants had standing to challenge the search of the warehouse (*id.* at 48a).

3. The court of appeals affirmed (Pet. App. 1a-31a). Contrary to the holding of the district court,

the court of appeals concluded that petitioners had a reasonable expectation of privacy in the D Street warehouse and therefore could challenge the seizure of the marijuana from that location (*id.* at 22a-23a). But the court of appeals agreed with the district court that the warehouse search warrant was not invalidated by the failure of the application to mention the earlier warrantless entry of the building (*id.* at 26a-27a).

The court also rejected petitioners' argument that the marijuana bales that the agents had seen during that entry had to be suppressed. The court found it unnecessary to resolve whether the warrantless entry was justified by exigent circumstances—specifically, the need to avert the possibility that evidence would be destroyed by persons who may have been inside. The court noted that the district court's failure to make findings on the question of exigency made it difficult to address that issue (Pet. App. 24a). Assuming arguendo that the warrantless entry was unlawful, the court reasoned that, even if that entry had never occurred, the agents would have sought and obtained a warrant to search the warehouse and inevitably would have discovered the bales of marijuana. The court found this "as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued" and observed that "there was no causal link whatever between the [assumedly] illegal entry and the discovery of the challenged evidence" (*id.* at 28a). Under the principles of *Segura* v. *United States*, 468 U.S. 796 (1984), and *Nix* v. *Williams*, 467 U.S. 431 (1984), the court therefore concluded that there was not a sufficient nexus between the assumed illegality and the evidence in question to justify suppression.[2]

SUMMARY OF ARGUMENT

For present purposes, it can be assumed (although it has not been adjudicated) that the agents misjudged the exigency for their warrantless entry into the warehouse and thus violated the Fourth Amendment. The question presented is whether that assumed illegality should lead to the suppression of evidence that was seen during the warrantless entry but was not seized until later when a valid, untainted warrant was issued. Important facts bearing on that question were adjudicated in the courts below, and petitioners are not free to substitute for those findings their own version of the facts, which is in any event contrary to the record. In particular, petitioners' contention that the agents in this case would not have sought a warrant but for what they saw in the warehouse is contrary to the findings below and is unsupported by the record. The result reached by

---

[2] The court of appeals also rejected a statutory speedy trial claim raised by petitioners (Pet. App. 4a-10a). Thereafter, petitioners filed petitions in this Court raising both a Fourth Amendment claim and a speedy trial claim (Nos. 85-1105 and 85-1118). This Court granted the petitions, vacated the judgment below, and remanded for reconsideration in light of *Henderson* v. *United States*, No. 84-1744 (May 19, 1986). In its opinion on remand from this Court, the court of appeals again rejected petitioners' speedy trial claim. The court of appeals did not reexamine its prior ruling on the Fourth Amendment question. Pet. App. 52a-61a. Petitioners again filed certiorari petitions raising both the Fourth Amendment and speedy trial claims (Nos. 86-995 and 86-1016). This Court granted the petitions limited to the Fourth Amendment question.

the court of appeals is correct because the decision to seek a warrant and the issuance of the warrant were both independent of the information the agents obtained during the warrantless entry.

A. 1. Before suppressing evidence as a sanction for illegal police conduct, this Court has always required a nexus between the illegal conduct and the evidence to be suppressed. Thus, the Court has never extended the exclusionary rule so far as to suppress evidence that is not the "fruit" of a constitutional violation. Evidence is a "fruit" only if the constitutional violation was in some sense the but-for cause of the government's possession of that evidence. All nine Justices reaffirmed that proposition in *Segura* v. *United States*, 468 U.S. 796 (1984), a case that, like the present case, involved an assumedly illegal warrantless entry followed by a warrant-authorized search of the same premises. The sole basis on which petitioners attempt to distinguish *Segura* is that its holding was limited to evidence that the entering officers did not *see* for the first time until the warrant-authorized search, whereas this case involves bales of marijuana that the agents saw in plain view during the warrantless entry.

2. Although the holding of *Segura* was limited to previously unseen evidence, the reasoning of that decision applies equally well to evidence that was previously seen. What the Court unanimously determined in *Segura* was that evidence whose seizure was not causally connected to any illegality is admissible. The seizure of the seen evidence was no more caused by the illegal entry in this case than the seizure of the unseen evidence. The seen evidence was not a "primary fruit" of the warrantless entry, as petitioners contend, because it was not a "fruit" of that

entry at all. Moreover, petitioners' proposed rule that the "primary fruit" of a constitutional violation may never be admitted, even when it has an untainted source independent of that constitutional violation, has no basis in this Court's jurisprudence. An illogical distinction between seen and unseen evidence cannot be justified merely by invoking the label "primary fruit."

3. There was no causal connection between the warrantless entry and the seizure of the bales of marijuana in this case; exclusion of the evidence would therefore be unwarranted under the analysis of both the majority and the dissenting Justices in *Segura*. This is a stronger case than *Segura* for admission of the evidence, because there is no contention in this case that evidence would have been removed from the warehouse or destroyed (and thus have been unavailable for seizure pursuant to the warrant) but for the agents' warrantless entry. The possibility of removal or destruction of evidence was the *only* causal connection that the dissenting Justices in *Segura* thought might justify suppression of the evidence in that case.

4. Petitioners' arguments about "confirmatory searches," in which the police conduct a warrantless search for the purpose of determining whether to bother to get a warrant, do not justify a departure from the "causal connection" requirement in this case. We assume for present purposes that evidence seized pursuant to a warrant following an illegal "confirmatory search" must be suppressed. That result is entirely consistent with the traditional requirement of causation, for the illegal search in those circumstances is a but-for cause of the issuance of the warrant. This case does not involve a confirma-

tory search. Nor have petitioners demonstrated any need for a prophylactic rule that treats *all* illegal searches that precede the issuance of a warrant as if they were confirmatory searches. Rather, the Court should continue to follow the traditional rule that a defendant should not be able to escape responsibility for his crime because of a constitutional violation that is not the cause of his conviction. The exclusionary rule is not to be applied as an arbitrary penalty on law enforcement, attaching to whatever probative evidence may conveniently be at hand.

B. The judgment of the court of appeals is also strongly supported by the "inevitable discovery" doctrine of *Nix* v. *Williams*, 467 U.S. 431 (1984). As the Court explained in *Nix*, the principle underlying both the "independent source" and "inevitable discovery" doctrines is that the police should not be put in a worse position than they would have occupied if they had complied with the law throughout. In addition, the Court noted, the deterrence rationale that provides the sole justification for the exclusionary rule is not significantly served when the evidence at issue "ultimately or inevitably would have been discovered by lawful means" (467 U.S. at 444).

The force of these principles is not undermined by the factual differences between *Nix* and the present case. *Nix* did not involve "primary evidence," but neither does this case. *Nix* was a Sixth Amendment case, but its principles derived from Fourth Amendment cases; there is no basis to ignore *Nix*'s principles in the Fourth Amendment context. And, although *Nix* involved a legal "line of investigation" that was being "actively pursued" before any illegality occurred, so does this case. The agents had not begun drafting the warrant affidavit before the warrantless entry occurred, but their investigation was leading inexorably toward the obtaining of a warrant, and the protective sweep did not in any way contribute to the acquisition of the warrant.

Finally, *Nix* demonstrates that petitioners are misguided in their assertions that suppression of the marijuana is required, regardless of causation, in order to further the deterrent purposes of the exclusionary rule. *Nix* teaches that "when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice" and that for that reason nonexclusionary remedies, such as departmental discipline and civil liability, provide a sufficient measure of deterrence (467 U.S. at 445-446). To the extent that it is "confirmatory searches" that petitioners wish to deter, internal disciplinary sanctions and the possibility of civil liability constitute very real threats. To the extent that petitioners are also insisting that mistaken judgments about exigent circumstances (such as the one arguably made in this case) must be deterred by an exclusionary sanction, they have not shown that an exclusionary sanction will produce any deterrent benefit, let alone a benefit that outweighs the societal cost of excluding probative evidence.

ARGUMENT

EVIDENCE SEIZED PURSUANT TO A VALID WARRANT, WHICH WOULD HAVE BEEN SOUGHT AND ISSUED EVEN IF THE EVIDENCE HAD NOT BEEN SEEN DURING A PRIOR WARRANTLESS SEARCH, SHOULD NOT BE SUPPRESSED AS A SANCTION FOR THE EARLIER WARRANTLESS SEARCH

This case concerns the admissibility of 270 bales of marijuana observed by agents during a warrantless entry into a warehouse but seized thereafter pursuant to a valid, untainted warrant. Although petitioners argue at length (Br. 19-24) that the initial entry violated the warrant requirement of the Fourth Amendment, the legality of that entry is not before the Court. Neither court below passed on the question whether the initial intrusion was justified by exigent circumstances. Instead, the lower courts refused to suppress the bales of marijuana because the contraband had been obtained pursuant to an untainted warrant. Petitioners do not dispute that the warrant was issued on probable cause and that the facts establishing probable cause were known to the agents before the initial entry into the warehouse. Nor do petitioners argue that the bales of marijuana were "seized" before the untainted warrant was executed. Accordingly, there is no substantive Fourth Amendment question in this case.[3] Instead, the ques-

[3] As the prevailing party in the court of appeals, we would be entitled to argue in this Court that the judgment of the court of appeals is correct on the ground that the warrantless search was lawful because it was justified by exigent circumstances. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382-387 (6th ed. 1986). We do not do so, however, because that fact-bound issue is not of sufficient importance to merit consideration by this Court; because there is some force to the observation of the court of appeals (Pet. App. 24a) that this issue should not be resolved in the absence of factual findings by the district court; and, of course, because we believe that the court of appeals was correct in its determination that the evidence in question should be admitted even if the warrantless search was unlawful. We emphasize only that it remains the government's position (to be litigated on remand in the lower courts if necessary) that the warrantless search in this case was lawful. This case involves, at worst, a mistaken judgment by law enforcement officers about the existence of exigent circumstances and not, as opposing counsel suggest, a blatant violation of the Constitution.

tion is solely one of remedy: Assuming that the warrantless entry was illegal, should the exclusionary rule be invoked to suppress the bales of marijuana that were seized pursuant to the warrant?

The question presented by this case is framed by the facts found below. In light of the factual findings of the lower courts, the issue to be decided can be characterized as follows: When officers conduct an assumedly unlawful protective sweep "'in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence'" (Pet. App. 42a), and "we can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant" (*id.* at 27a), and "there was no causal link whatever between the [assumedly] illegal entry and the discovery of the challenged evidence" (*id.* at 28a), must the evidence be suppressed because it was first seen during the warrantless

entry? It is that question that the court of appeals answered in the negative, and we think properly so.

An entirely different question would be presented if the facts were as petitioners claim.[4] Indeed, on

[4] The best that can be said about petitioners' version of the facts is that *some* of their assertions, *if* they had been credited by the district court, would have sufficient record support not to be set aside as clearly erroneous. Other factual assertions by petitioners lack record support altogether. For example, petitioners' assertion that the warrantless entry lasted for more than 10 to 15 minutes (Br. 30-31) is contrary to the record. The agents consistently testified that the protective sweep lasted no more than five minutes. 3 Tr. 33 (Agent Kennedy: 2 minutes); 6 Tr. 16; J.A. 77 (Supervisor Garibotto: 3-5 minutes). The two agents who arrived while the sweep was in progress testified that they remained inside for less than a minute. 2 Tr. 24-26; J.A. 55 (Agent Cleary: 30 seconds); 4 Tr. 46; 5 Tr. 36; J.A. 68 (Agent Keaney: less than one minute). Those two agents gave no testimony as to when the sweep began. Once the doors to the warehouse were closed, no agent entered the premises until the search warrant issued. 3 Tr. 47. Consistent with this evidence, the courts below found that the agents had entered "to determine if anyone was in the building" (Pet. App. 11a; accord *id.* at 42a), that the agents left after "a brief view of the premises" (*id.* at 12a, 42a), and that "the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued" (*id.* at 28a).

Furthermore, petitioners' contention (Br. 8; see also Br. 31) that the prosecutor admitted that the warrant-authorized search in this case was based on the prior warrantless search of the warehouse is incorrect. When the prosecutor's remarks are placed in context it is clear that he was telling the district court that the search warrant was the result of the warrantless searches of the camper and Rooney's truck—not the warrantless entry into the warehouse. See J.A. 47.

Indeed, there is *no* support in the record for petitioners' allegation (Br. 31) that the "idea of getting a warrant arose

their version of the facts we would agree with petitioners that the judgment of the court of appeals should be reversed. If it were true that the officers in this case would not have sought and obtained a warrant but for the warrantless search of the warehouse, then we would agree with petitioners that the warrant-authorized search does not justify the admission of otherwise suppressible evidence. We do not contend, as petitioners claim we do (Br. 28-32), that the agents' possession of untainted information amounting to probable cause, without more, makes the subsequent discovery of that same evidence pursuant to a warrant "independent" or "inevitable." Rather, we recognize the need for an additional determination that the agents would have sought the warrant in the absence of any illegality. Such a determination has been made in this case,[5] and it is supported by the record.

only after the agents and the prosecutor had illegally entered the building and taken their tours of the premises." On the contrary, the agents testified that they had entered the building to look for any persons who might be in a position to destroy evidence. 2 Tr. 25; 3 Tr. 30; J.A. 77-78. Thus, the agents did not enter the warehouse in order to determine whether to seek a warrant; they were trying to preserve the evidence until the warrant could be obtained.

[5] The court of appeals observed that "the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant" (Pet. App. 28a). To be sure, the district court did not find in so many words that the agents would have sought a warrant in the absence of the warrantless entry into the warehouse, but it did find quite explicitly that the purpose of the warrantless entry was " 'to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence' " (*id.* at 42a). That finding is utterly inconsistent with any

A. The Bales Of Marijuana Were Not The Fruit Of The Initial Entry

1. *Evidence Is Not a Fruit of an Unlawful Search Unless There Is a Causal Connection Between That Search and the Seizure of the Evidence*

Typically, the exclusionary rule is invoked to suppress "[e]vidence obtained as a direct result of an unconstitutional search or seizure." *Segura* v. *United States*, 468 U.S. at 804; see, *e.g.*, *Arizona* v. *Hicks*, No. 85-1027 (Mar. 3, 1987); *United States* v. *Chadwick*, 433 U.S. 1 (1977); *Chimel* v. *California*, 395 U.S. 752 (1969); *Katz* v. *United States*, 389 U.S. 347 (1967); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914). In addition, evidence that is obtained through exploitation of the prior illegality is sometimes suppressed as the "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In order for

---

supposition that the decision to seek a warrant was made during or after the warrantless entry; a determination that the purpose of an entry was the preservation of evidence necessarily presupposes that those persons making the entry already (at the time of entry) contemplate a later search for the evidence so preserved. And, as noted, the court of appeals certainly had no doubt that the decision to seek a warrant was entirely independent of the warrantless entry. Thus, we submit that the requisite finding that a warrant would have been sought in the absence of any illegality has been made in this case, and that the case should be analyzed on that basis. If the Court disagrees and concludes that a more explicit finding is necessary, however, it would be appropriate for the Court to state what factual findings are essential to a proper resolution of the legal question and remand to the district court to make those findings. See *Icicle Seafoods, Inc.* v. *Worthington*, No. 85-195 (Apr. 21, 1986), slip op. 5.

evidence to be a "fruit" of the illegality, there must necessarily be a causal connection between the evidence the government is seeking to introduce and the illegality. Put another way, suppression is appropriate only if "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). The test for determining whether evidence is the "fruit" of a prior illegality is whether it was " 'come at by exploitation of [the initial] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun*, 371 U.S. at 488 (citation omitted). This Court has never suppressed evidence in the absence of a causal connection between the illegal action and the obtaining of the evidence in question.

If evidence is obtained pursuant to a valid search warrant, which is sought and issued on the basis of probable cause developed before and independent of an illegal entry, it is admissible at trial under the "independent source" doctrine because of the absence of a causal connection between the illegal entry and the seizure of the evidence. *Segura* v. *United States*, *supra*; see also *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). In *Segura*, as in this case, the police developed probable cause to believe that evidence would be found in a certain location and decided to obtain a warrant to search that location. After arresting the defendant, the officers conducted a warrantless "protective sweep" of the premises to ensure that the evidence was not destroyed while a warrant was sought. Thereafter, a search warrant was issued solely on the basis of the information known to the officers before the warrantless entry. Pursuant to the warrant the officers searched

the apartment again and seized incriminating evidence.

Both the majority and the dissenting Justices in *Segura* concluded that the evidence discovered and seized during the warrant-authorized search should not be suppressed unless the illegal entry was the "but for" cause of the officers' acquisition of that evidence. 468 U.S. at 815; *id.* at 817 (Stevens, J., dissenting) ("I do not believe that the current record justifies suppression of the challenged evidence * * *."); *id.* at 830 ("causation is a necessary but not a sufficient condition for exclusion"). The Court was divided, however, over whether the test of but-for causation was met on the facts of that case. The majority determined that the illegal entry contributed nothing to the showing of probable cause, that the evidence was lawfully seized pursuant to the warrant, and that the evidence therefore should not be suppressed. The Court explained (468 U.S. at 813-814):

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.

Applying the test articulated in *Wong Sun*, the Court found that the "valid warrant search was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry" (468 U.S. at 814 (quoting 371 U.S. at 488)). To the extent that there was any causal relationship between the illegal entry and the ultimate warrant-authorized

search, it was simply that the agents, by securing the apartment, had prevented the defendants from destroying or removing evidence. But, the Court held, there is no " 'constitutional right' to destroy evidence," and the exclusionary rule, "which already exacts an enormous price from society and our system of justice," should not be used to " 'protect' criminal activity" (468 U.S. at 816).

In *Segura*, the Court decided only the question whether evidence discovered for the first time during the warrant-authorized search should be suppressed in light of the prior illegal entry. The Court left open the question whether evidence first discovered during the warrantless search should be suppressed,[6]

---

[6] "The only issue here is whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed." 468 U.S. at 804. Petitioners make the surprising suggestion (Br. 36-37) that, just two paragraphs after stating that the issue was not before it, the Court nevertheless resolved the issue by its statement that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion" (468 U.S. at 804). Petitioners are wrong for at least two reasons. First, the quoted sentence, in context, was simply a shorthand characterization of the Fourth Amendment exclusionary rule and was obviously not meant to be read as absolute and without exception. The statement did not overturn the settled principle that "independent source" analysis may be applied to evidence obtained as a direct result of an unconstitutional search or seizure, any more than it overturned the settled principle that evidence obtained as a direct result of an unconstitutional search or seizure will be admitted if the person objecting to its admission lacks "standing." Second, petitioners fail altogether to come to grips with the fact that evidence *discovered* as a direct result of an unconstitutional search or seizure is not the same as evidence *obtained*

although six Justices commented on a possible distinction between seen and unseen evidence.[7] In this case, the Court is squarely confronted with the question whether 270 bales of marijuana, discovered during the initial entry but not seized until the later warrant-authorized search, should be suppressed.

2. *The Fact That Evidence Is Seen During an Unlawful Search Does Not Provide the Requisite Causal Connection to Make it a Fruit of That Search*

The reasoning in *Segura* applies with full force to the present case, in which the evidence in question was seen during the warrantless entry. There is no rational basis for distinguishing between evidence observed during the illegal entry but seized during the untainted warrant-authorized search and evidence first observed during the warrant search. See *Segura*, 468 U.S. at 831 (Stevens, J., dissenting). In either case, there is no causal connection between the illegal entry and the seizure of the evidence—a connection that the Court has always deemed neces-

---

as a direct result of an unconstitutional search or seizure, which is the kind of evidence the Court was discussing. Even if the Court's statement stood for a proposition as absolute as petitioners suggest, it would apply only to the latter kind of evidence and not, as petitioners contend, to the former.

[7] The four dissenters explicitly rejected any different treatment of seen and unseen evidence. 468 U.S. at 831 (Stevens, J., dissenting). Two Justices in the majority observed that a different result *may* be required, but that remark simply noted the distinction that had been drawn by the court of appeals in that case; it did not purport to decide the admissibility of previously seen evidence, an issue that was not before the Court. 468 U.S. at 811, 812 (Burger, C.J., joined by O'Connor, J.).

sary (but not sufficient) to invoke the exclusionary rule.

In the present case, the fact that the agents saw the bales during the protective sweep contributed nothing to the ultimate seizure of the bales. The warrant was issued on probable cause that had developed before the initial entry. It "provided an 'independent' justification for seizing all the evidence in the [warehouse]—that in plain view just as much as the items that were concealed" (*Segura*, 468 U.S. at 831 (Stevens, J., dissenting)). Had the protective sweep never occurred, the contraband would have been seized pursuant to the warrant in precisely the same way. Thus, as the four dissenting Justices concluded in *Segura*, the warrant removed the taint not only from the "hidden fruit," but also from the "fruit in plain view" (*ibid.* (footnote omitted)). Accord *United States* v. *Whitehorn*, 813 F.2d 646, 649-650 (4th Cir. 1987), petition for cert. pending, No. 86-2013; *United States* v. *Salgado*, 807 F.2d 603, 607 (7th Cir. 1986), petition for cert. pending, No. 86-1386; *United States* v. *Merriweather*, 777 F.2d 503, 506 (9th Cir. 1985), cert. denied, No. 85-6384 (Mar. 31, 1986); 2 W. LaFave, *Search and Seizure* § 6.5(c), at 674 n.85 (2d ed. 1987); 4 *id.* § 11.4(d), at 413 n.211; *id.* § 11.4(f), at 430-431 & n.266; see also *United States* v. *Grandstaff*, 813 F.2d 1353, 1355-1357 (9th Cir. 1987).[8]

---

[8] In at least two of the pre-*Segura* cases from lower courts that were cited with approval in *Segura*, 468 U.S. at 814 n.9; see also *id.* at 835-836 n.30 (Stevens, J., dissenting), the courts upheld the admission pursuant to a warrant-authorized search of evidence that had first been seen during an illegal warrant-

Petitioners seek to justify a distinction between seen and unseen evidence, and thus to distinguish *Segura*, by labeling seen evidence as the "primary" fruit of the illegal entry and arguing that independent source analysis is applicable only to "secondary" fruit of the entry—the evidence that is not seen during the illegal entry—and not to the "primary" fruit of the entry.[9] But to fashion a meaningful distinction between seen and unseen evidence, one must do more than merely attach different labels to the two. Petitioners have offered no persuasive explanation of why evidence that is observed during an unlawful entry should be suppressed, while evidence that does not happen to fall within the officers' view during their entry should not be suppressed. Under petitioners' analysis, a bale of marijuana that the officers happened to have glanced at during their entry would be subject to suppression, but an identical bale lying just out of their sight would not. Indeed, the logical

---

less search. See *United States* v. *Bosby*, 675 F.2d 1174, 1180-1181 (11th Cir. 1982) (contents of a briefcase had been seen during illegal search); *United States* v. *Fitzharris*, 633 F.2d 416, 421 (5th Cir. 1980) (marijuana had been seen during warrantless search of a ranch), cert. denied, 451 U.S. 988 (1981).

[9] Petitioners sometimes go even further and label evidence discovered during an illegal search the "poisonous tree" itself (Br. 13, 27). But the "poisonous tree," of course, is the Fourth Amendment violation, not evidence discovered during that violation. See, *e.g.*, *United States* v. *Pimentel*, 810 F.2d 366, 368 (2d Cir. 1987) (correcting similar error in terminology used by district court). Evidence is or is not the "fruit of the poisonous tree" depending on whether it "grows" from the constitutional violation or from a more wholesome source.

conclusion of petitioners' argument would seem to be that, if the bales were piled on top of one another, only the outer layer of bales would have to be suppressed. There is no principled justification for such an outcome.[10]

In any event, the label "primary fruit" is not appropriately applied to evidence that is seen but not seized during an illegal search. The "primary fruit" of particular misconduct is the evidence that is directly obtained as a result of that misconduct.[11]

---

[10] One could argue that seen evidence should be suppressed because it is only if the evidence is unseen that a reviewing court can have complete confidence that the warrant was not sought in order to seize the evidence that was discovered in the course of the initial entry. But that rationale deprecates the ability of district courts to make accurate determinations as to the reasons that a warrant was sought. See pp. 34-35, *infra*. In any event, that rationale would not provide a reliable means of identifying those cases in which the initial entry provided the incentive to seek the warrant: Suppression would be required in many cases in which the issuance of the warrant obviously was not dependent in any way on the officers' observations during the initial entry, while suppression would not be ordered in cases in which the warrant was sought because of the officers' observations during the initial entry—for example, where the officers sought the warrant because of certain evidence they saw during the initial entry, but where the search disclosed other, previously unseen evidence, which was then offered in evidence at trial.

[11] For example, in *United States* v. *Crews*, 445 U.S. 463 (1980), a robbery victim identified her assailant after his illegal arrest, and the Court recognized that the post-arrest identification should be suppressed. But the Court refused to suppress the victim's in-court identification of her assailant as the fruit of the defendant's illegal arrest. The Court noted that the victim came forward before the arrest occurred, and therefore her presence at trial was not traceable to any

Thus, the primary fruit of an illegal search is information that the officers learn from the search and any tangible evidence that they seize during the search.[12] Those authorities that describe "primary" fruit as evidence *discovered* during an illegal search are in fact referring to evidence that was both discovered and *seized* without a warrant. See, *e.g.*, 4 W. LaFave, *Search and Seizure* § 11.4, at 369-370 (2d ed. 1987) (citing *Mapp* v. *Ohio*, 367 U.S. 643 (1961)). In this case, no evidence was seized during the warrantless entry into the warehouse, and thus

---

Fourth Amendment violation: "the toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned" (445 U.S. at 472). As the Court explained, "[t]he exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully *obtained*; it does not reach backward to taint information that was in official hands prior to any illegality" (*id.* at 475 (emphasis added)). Accord *United States* v. *Wade*, 388 U.S. 218, 240-242 (1967) (remanding for a determination of whether the in-court identification had an "independent source"). The inadmissible "primary fruit" was the post-arrest identification obtained as a direct result of the illegal arrest.

[12] For example, in *United States* v. *Karo*, 468 U.S. 705 (1984), agents illegally searched a house by monitoring without a warrant a beeper attached to a container of ether that had been taken into the house. Eventually, the agents obtained a search warrant issued on the basis of other, untainted information authorizing the search of the house and the seizure of the container of ether. The Court observed that the information obtained by monitoring the beeper without a warrant was inadmissible at trial (468 U.S. at 719). But the Court held that the evidence seized pursuant to the valid, untainted warrant would not be suppressed (*id.* at 720-721 & n.7). The inadmissible "primary fruit" of the illegal search was what the officers learned as a result of that search. Information learned and tangible evidence seized independently were not "fruits" of the illegal search at all.

the only fruit of that entry was information rather than tangible evidence. During the brief initial entry, the agents learned that the warehouse contained marijuana. That information was the "primary fruit" of the assumed Fourth Amendment violation. Accordingly, to the extent that *Weeks* v. *United States*, 232 U.S. 383 (1914), requires suppression of "primary fruit," the exclusionary rule would only prohibit the government from presenting evidence regarding the protective sweep. Thus, under conventional analysis, the bales of marijuana that were seized pursuant to the valid warrant were not the "primary" fruit of the initial entry simply because they were "discovered" during the course of the protective sweep of the warehouse.

Even if the term "primary fruit" can appropriately be applied to the marijuana observed in this case, petitioners' argument that the "primary fruit" of the initial entry must be suppressed is contrary to well-settled principles of Fourth Amendment law. The Court long ago made clear that independent source analysis is applicable to primary fruit, however it is defined. In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the question presented was the admissibility of evidence that had been unlawfully seized, not just seen. The Court held the evidence inadmissible because the government had exploited the initial illegality by using information learned thereby to subpoena that same evidence. The Court cautioned, however, that "the facts [illegally] obtained"—primary fruits of the illegality under any definition—do not "become sacred and inaccessible" (251 U.S. at 392). "If knowledge of them is gained from an independent source they may be proved like any others" (*ibid.*). Fourth Amendment

scholars would be quite surprised to learn that, as petitioners contend (Br. 10-11, 12-13, 16-19, 27, 35-37), *Silverthorne* has effectively been overruled and the independent source doctrine no longer applies to primary evidence. See, *e.g.*, 4 W. LaFave, *supra*, § 11.4(f), at 420-424 (discussing situation in which "a second search is undertaken to acquire precisely the same information which the authorities obtained under an earlier, illegal search"—*i.e.*, the primary fruit—and citing with approval several cases in which admission of the information was upheld).

Thus, petitioners' attempt to use a label to justify a distinction between seen and unseen evidence is not sound. *Segura*'s holding was limited to unseen evidence, but its logic cannot be so confined.

3. *There Is No Causal Connection in This Case Between the Warrantless Entry and the Seizure of the Bales of Marijuana*

Petitioners cannot overcome the fact that there was no causal connection in this case between the discovery of the marijuana during the protective sweep and its seizure pursuant to the valid, untainted warrant. The marijuana introduced at trial was in no sense the product of the initial entry. Information learned during that entry was not used to obtain the warrant and was "rediscovered" when the agents executed the untainted warrant eight hours later.[13] During the course of the warrant-authorized

[13] Petitioners criticize (Br. 38) the agents in this case because, in presenting their search warrant application to the magistrate, they did not disclose that they had already entered the warehouse without a warrant. Petitioners argue that the exclusionary rule should be invoked to deter such omissions. But the information about the prior entry was irrelevant to the task before the magistrate—determining whether there was probable cause to search the warehouse. The magistrate was simply deciding whether a warrant should issue. He was not deciding whether to suppress evidence because of a prior illegal entry. The exclusionary rule question did not arise until an indictment was returned. Moreover, by eliminating the information regarding the security sweep from the affidavit, the agents were able to ensure that the warrant was issued solely on the basis of probable cause that had developed before the entry. See, *e.g.*, *Segura*, 468 U.S. at 814 ("No information obtained during the initial entry * * * was * * * used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged."). Far from "duplicit[ously]" omitting "material" information from the affidavit (Pet. Br. 42), agents who omit from an affidavit information learned during an earlier search whose legality may be open to question show commendable caution in making absolutely certain that the magistrate's determination is not based on tainted information.

search, the agents seized the 270 bales of marijuana. This tangible evidence was untainted by the prior illegal entry and was admissible under the independent source doctrine.

Indeed, if previously seen and previously unseen evidence are to be treated alike, then the evidence in this case is admissible not only under the rationale of the *Segura* majority, but also that of the dissenters. The dissenting Justices, unlike the majority, would have considered as part of the causation inquiry whether the evidence would have been removed or destroyed in the absence of illegal conduct by the police (468 U.S. at 834-835 (Stevens, J., dissenting)). Also unlike the majority, the dissenters believed that the police had violated the Fourth Amendment, above and beyond the illegal entry, by impound-

ing the premises from the inside for 18 to 20 hours while awaiting the warrant (*id.* at 820-827). They would have remanded for a "specific finding as to whether the Government had demonstrated that the evidence obtained pursuant to the search warrant would have remained in the apartment had the agents not illegally entered and impounded it" (*id.* at 838). Had such a finding been made, the dissenting Justices apparently would have affirmed the convictions (see *id.* at 817).

In the present case, it is quite certain that the 270 bales of marijuana would have remained undisturbed if the agents had stayed outside the warehouse until the warrant arrived. The protective sweep of the warehouse lasted only two to five minutes. After the agents learned that the warehouse was unoccupied, they left, locked the door, and continued their surveillance; they did not reenter until the warrant was obtained. Unlike the situation in *Segura*, we can be certain that no one inside the warehouse would have destroyed or removed evidence if the agents had not entered, because there was no one inside.[14] Nor did the agents prevent anyone else from entering.[15] Accordingly, the brief warrantless entry was

[14] Of course, the fact that it turned out that there was no actual risk that the evidence would be destroyed does not undercut the reasonableness of the agents' concern that evidence inside the warehouse might be subject to destruction, since the agents did not know, before the protective sweep, that no one was inside the warehouse at the time.

[15] If the agents *had* prevented anyone from entering, that act might have been the but-for cause of the preservation of the evidence, but it would have been causally unrelated to the initial entry and would not itself have been illegal. If securing premises (which necessarily implies stopping persons who wish to enter) is a seizure at all, it certainly is a reasonable (and therefore constitutional) seizure when there is probable cause to search the place that is secured and the securing is limited in duration, as it was in this case, to the eight hours necessary to secure a warrant. See *Segura*, 468 U.S. at 798 (holding of the Court that securing apartment from the inside pending acquisition of a warrant for 18 to 20 hours did not violate the Fourth Amendment); *id.* at 823-824 & n.15 (Stevens, J., dissenting) (arguing that those actions violated the Fourth Amendment but "assum[ing] impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'"); *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (noting with approval the practice of placing police guards outside crime scene in order to preserve evidence). See generally 2 W. LaFave, *Search and Seizure* § 6.5 (2d ed. 1987).

irrelevant to the agents' ability to seize the bales of marijuana when they executed the search warrant. In no sense was the marijuana the "fruit" of the initial illegal entry—primary, derivative, or otherwise.

4. *It Is Not Necessary in This Case to Abandon the Causal Connection Requirement in Order to Deter "Confirmatory Searches"*

Because this Court has never suppressed evidence as a sanction for a constitutional violation that was not the but-for cause of the government's possession of the evidence, it should be clear that petitioners are asking for a significant expansion of the exclusionary rule. As their justification for urging a departure from the bedrock principle of causation heretofore applied in all of this Court's exclusionary rule cases, petitioners claim (Br. 38-46) that such a departure is necessary to deter so-called "confirmatory searches," in which officers conduct an initial, unlawful search in order to determine whether to go to

the trouble to get a warrant. No such departure is necessary, however. We assume for present purposes that evidence seized pursuant to a warrant following an illegal "confirmatory search" must be suppressed. If so, it is because the causation requirement, properly applied, is entirely consistent with suppression of the evidence obtained pursuant to a warrant that is issued following a confirmatory search.

When officers have probable cause, engage in an illegal warrantless search to confirm that contraband can actually be found on the premises, and only then get a warrant based on the preexisting probable cause, the information learned during the warrantless search is in a very real sense the but-for cause of the warrant-authorized search even though it is not used in the warrant application. The very purpose of any confirmatory search is to obtain information to use in deciding whether to get a warrant. In no relevant sense, therefore, was it inevitable before the confirmatory search that a warrant would eventually be obtained, nor has the warrant been obtained independently of the information learned during the confirmatory search. The warrant is a "fruit" of the confirmatory search, not in the usual sense that the showing of probable cause depended on the information gleaned from the search, but in the sense that the information from the search influenced the decision to seek a warrant. See *United States* v. *Salgado*, 807 F.2d at 606 (absence of a causal connection between warrantless search and later issuance of warrant is not shown unless officers would have sought a warrant in the absence of the warrantless search).

For this reason, the leading "confirmatory search" case on which petitioners rely (*People* v. *Cook*, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978)),

may have been correctly decided, but for reasons that do not justify abandoning causation as a prerequisite for applying the exclusionary rule. The *Cook* court did not purport to hold that *all* cases involving illegal warrantless searches followed by warrant-authorized searches must be presumed to be "confirmatory search" cases and must result in suppression. Rather, it held that defendants are entitled to try to demonstrate to the trial court that any given warrantless search was "confirmatory" and, if they so demonstrate, to obtain suppression of the evidence later seized pursuant to the warrant (22 Cal. 3d at 99, 583 P.2d at 149, 148 Cal. Rptr. at 624). See also 4 W. LaFave, *supra*, § 11.4(f), at 425 (footnote omitted) ("Even if it is thought that such strong medicine is needed to deal with the so-called 'confirmatory search,' conducted for the precise reason of making sure that it is worth the effort to obtain a search warrant, some care is needed in determining just when a prior police search is of that character."); cf. *People* v. *Steeg*, 175 Cal. App. 3d 665, 688, 220 Cal. Rptr. 904, 917-918 (1985) (accepting the theory that evidence initially discovered during an illegal warrantless search but seized pursuant to the untainted warrant may be admitted), review granted, 715 P.2d 564, 224 Cal. Rptr. 605 (1986). The result in *Cook*—attaching different legal consequences to confirmatory searches than to other kinds of illegal searches—is entirely consistent with a "causation" analysis.[16]

---

[16] We are not suggesting that otherwise unlawful police behavior in a case such as this one would be lawful if the warrantless entry were conducted for a legitimate purpose; an entry to preserve evidence can be just as illegal as an entry

Petitioners do not benefit from the approach employed in *Cook*. In the present case, the trial court has already made findings of fact that are inconsistent with the proposition that the warrantless search was confirmatory in purpose; rather, the purpose of the initial entry was to prevent the destruction of evidence (Pet. App. 42a) pending the acquisition of a warrant.

Nor should this Court accept petitioners' implicit invitation to abrogate the causation requirement, to go beyond *Cook*, and to hold that all illegal warrantless entries followed by warrant-authorized searches must be irrebuttably presumed to be confirmatory searches. That approach would provide a windfall to criminal defendants whose convictions were in no sense the product of any illegal behavior by the police. It cannot be justified as a prophylactic measure unless the Court is willing to join petitioners in the view (see Pet. Br. 40-42) that police officers will routinely perjure themselves by misrepresenting their intent at the time of the warrantless entry, and that trial courts will be incapable of distinguishing perjured denials of the intent to conduct a confirmatory search from the far more common situation in which a warrantless search takes place because of the officers' mistaken judgment about the existence of exigent circumstances. There is no basis

---

to confirm the existence of contraband. We are, however, saying (as do the authorities dealing with "confirmatory searches") that the purpose of the entry can be extremely important in deciding whether the exclusionary rule should be applied. Petitioners obviously understand this to be true as well, for they labor mightily to try to refute the finding of the district court (Pet. App. 42a) that the purpose of the entry in this case was to preserve evidence.

to depart from settled exclusionary rule principles requiring causation because of such skepticism about the probity of officers and the perspicacity of judges.

The federal appellate court decisions that discuss the issue presented in this case lend no support to petitioners' suggestion that agents will routinely perform "confirmatory searches" before obtaining a warrant unless the exclusionary rule is invoked here. In most of the decided cases, the officers initially entered the premises to look for other persons in order to prevent the destruction of evidence. See, *e.g.*, *Segura* v. *United States*, *supra*; *United States* v. *Salgado*, 807 F.2d at 609; *United States* v. *Echegoyen*, 799 F.2d 1271, 1278-1279 (9th Cir. 1986) (search for persons and to eliminate a fire hazard); *United States* v. *Curry*, 751 F.2d 442, 447-448 (1984), opinion after remand, *United States* v. *Silvestri*, 787 F.2d 736 (1st Cir. 1986), petition for cert. pending, No. 86-678; *United States* v. *Owens*, 782 F.2d 146, 151 (10th Cir. 1986); *United States* v. *Merriweather*, 777 F.2d at 505; *United States* v. *Satterfield*, 743 F.2d 827, 847 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); *United States* v. *Griffin*, 502 F.2d 959, 960 (6th Cir.), cert. denied, 419 U.S. 1050 (1974); see also *United States* v. *Whitehorn*, 813 F.2d at 649 (bomb sweep). In some of these cases, the initial entry was held to be justified by exigent circumstances. See, *e.g.*, *United States* v. *Echegoyen*, *supra*; *United States* v. *Merriweather*, *supra*; *United States* v. *Satterfield*, *supra*. In other cases, the initial intrusion was ruled unlawful. See, *e.g.*, *United States* v. *Whitehorn*, *supra*; *United States* v. *Curry*, *supra*; *United States* v. *Griffin*, *supra*; *United States* v. *Segura*, 663 F.2d 411, 414-415 (2d Cir. 1981), aff'd, 468 U.S. 796 (1984). In still other

cases, the reviewing court did not decide whether the initial entry was justified by exigent circumstances, because the challenged evidence was nevertheless admissible under either the inevitable discovery or the independent source exception to the exclusionary rule. See, *e.g.*, *Segura* v. *United States*, *supra*; *United States* v. *Salgado*, *supra*. Significantly, however, there is no federal case that finds that the purpose of the initial entry was to conduct a "confirmatory search." Accordingly, experience suggests that agents do not commonly abuse the warrant requirement by conducting warrantless "confirmatory searches." [17]

Although we do not believe that agents will routinely conduct confirmatory searches in the absence of a broad exclusionary rule sanction that covers this case, we acknowledge that officers do occasionally misjudge the need to conduct a security sweep. But exigent circumstances are so difficult to calculate that is hard to criticize an officer who, with little time for reflection, overestimates the threat of destruction of evidence. Moreover, preserving evidence until a warrant can be obtained is an important and wholly legitimate law enforcement objective. Although officers should not be encouraged to act impetuously, neither should they be discouraged from making on-the-spot

[17] The experience in the state systems is similar. Petitioners point to one instance of a confirmatory search in California (see *People* v. *Cook*, *supra*) and the comments of one justice of the Supreme Court of Colorado (see *People* v. *Barndt*, 199 Colo. 51, 60-61, 604 P.2d 1173, 1179 (1980) (Erickson, J., concurring and dissenting); but cf. *People* v. *Griffin*, 727 P.2d 55 (Colo. 1986) (Erickson, J., for a unanimous court)). The existence of two state cases involving confirmatory searches is hardly compelling evidence that the practice of conducting confirmatory searches is widespread or that courts cannot distinguish such searches from entries based on perceived exigency.

judgment calls that are essential to good police work. In this setting, a policy of dispensing with the requirement of causation and suppressing all the evidence found in a warrant-authorized search any time the police have made an initial unauthorized entry into the premises might induce police officers to be unduly cautious in finding exigent circumstances. If that occurred, the costs of the exclusionary rule would include not only the suppression of reliable evidence at trial, but the destruction of critical evidence in the investigative process. In this area, as elsewhere in Fourth Amendment jurisprudence, it is a sufficient deterrent to unlawful searches that the evidence whose acquisition was caused by the miscalculated exigent entry is suppressed. No more deterrence is needed or desirable.

Even if there were something to petitioners' deterrence theory, that would not be a sufficient reason to depart from the causation requirement. The exclusionary rule was never intended to be a comprehensive remedy for violations of the Fourth Amendment. Constitutional violations that produce no useful evidence go unpunished by the exclusionary rule. Violations of the constitutional rights of one person that produce useful evidence only against other persons likewise go unpunished by the rule—although expansion of the exclusionary remedy to punish such violations might have some marginal deterrent effect. *Alderman* v. *United States*, 394 U.S. 165, 171-176 (1969); *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978); *United States* v. *Salvucci*, 448 U.S. 83, 95 (1980). Constitutional violations that produce evidence that would inevitably have been discovered anyway should not, the Court has unanimously agreed, result in the exclusion of that evidence. See

Nix v. *Williams*, 467 U.S. 431, 444 (1984); *id.* at 452, 456-457 (Stevens, J., concurring in the judgment); *id.* at 459 (Brennan, J., dissenting). Although some criminals may go free because "the constable has blundered," defendants who are not affected by the constable's blunder have no right to argue that they should receive a benefit *solely* because letting their crimes go unpunished will deter police misconduct. "[This Court has] consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truthfinding functions of judge and jury. * * * After all, it is the defendant, and not the constable, who stands trial." *United States* v. *Payner*, 447 U.S. 727, 734 (1980).[18]

B. The Inevitable Discovery Doctrine Also Supports Admission Of The Bales Of Marijuana

The "independent source" doctrine, which was applied in *Segura*, is related to a second principle—the "inevitable discovery" doctrine—which was approved by all nine Members of this Court in *Nix* v. *Williams*, 467 U.S. 431, 444 (1984); *id.* at 452, 456-457 (Stevens, J., concurring in the judgment); and *id.* at 459 (Brennan, J., dissenting). The independent

[18] See also *United States* v. *Mitchell*, 322 U.S. 65, 70-71 (1944) ("Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct."); *United States* v. *Salgado*, 807 F.2d at 607 ("[T]he exclusionary rule does not require the exclusion of evidence that would have been obtained lawfully, just in order to punish a search that did not harm the defendant in any sense relevant to a criminal proceeding, because the search was not a necessary step in obtaining evidence used to convict him. * * * [The illegal entry] was not a cause, in the legal sense, of his conviction.").

source doctrine is the narrower doctrine, because it applies only to cases in which the evidence offered at trial was actually obtained from an independent source, while the inevitable discovery doctrine applies to any evidence that "would have been discovered as a matter of course if independent investigations were allowed to proceed" (*id.* at 459 (Brennan, J., dissenting)). In a case such as this one, where the evidence was obtained as a result of a warrant-authorized search, the "independent source" doctrine is directly applicable. Yet, because the evidence in this case would have been discovered as a result of the warrant even if the warrant had for some reason not been executed, the inevitable discovery doctrine is applicable as well.

The governing principles of the inevitable discovery doctrine are found in *Nix* v. *Williams*, *supra*. In *Nix*, the defendant was arrested for the murder of a young girl although her body had not yet been found. At the time of the arrest, a countywide search for the body was under way. The arresting officers, in a manner that this Court found to violate the Sixth Amendment, elicited from the defendant a statement regarding the whereabouts of the body. Acting on that statement, the officers recovered the body before the search party reached the site. This Court held that the defendant's incriminating statement revealing the location of the body was properly suppressed as the fruit of the Sixth Amendment violation. Nevertheless, even though the body itself was also a fruit of the Sixth Amendment violation, the Court held that the evidence regarding the discovery of the body was admissible at trial because the body would inevitably have been discovered by the search party.

Nix announced several important principles. First, in discussing the independent source doctrine, the Court wrote: "The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." 467 U.S. at 443 (footnote omitted). Petitioners' argument flies in the face of this principle. As they admit (Br. 27), they argue that "the government should indeed be put in a worse position than if it had complied with the Fourth Amendment."

Turning to the inevitable discovery doctrine, the Court wrote that the purpose of that doctrine, which is "closely related * * * to the harmless-error rule of *Chapman* v. *California*, 386 U.S. 18, 22 (1967)[,] * * * is to block setting aside convictions that would have been obtained without police misconduct" (467 U.S. at 443 n.4). The Court also wrote: "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by unlawful means * * * then the deterrence rationale has so little basis that the evidence should be received" (*id.* at 444 (footnote omitted)). The Court emphasized with respect to the inevitable discovery doctrine, as with respect to the independent source doctrine, that the police should not be "put * * * in a *worse* position than they would have been in if no unlawful conduct had transpired" (*id.* at 445). Again, petitioners do not and cannot deny that this reasoning, if applied to their case, would require rejection of their position.

Petitioners argue that there are differences between *Nix* and the present case that require the

Court to depart from the principles set forth in *Nix*. One of their arguments is that *Nix* involved "derivative" evidence and should not be extended to "primary" evidence (Br. 11-12, 13, 27, 37). That argument requires little discussion, because—as we have noted above—petitioners invoke an inaccurate label when they claim that this case involves "primary" evidence.[19] A second argument—that *Nix* has no application when the antecedent illegality is a violation of the warrant requirement of the Fourth Amendment (Pet. Br. 18, 26, 27; see also ACLU Br. 30-33)—runs counter to the theme of *Nix* and has no apparent logical basis. Although the violation in *Nix* was a Sixth Amendment violation, *Nix* derives its reasoning from Fourth Amendment cases. See 467 U.S. at 442; see also 4 W. LaFave, *supra*, § 11.4(a), at 378 n.49 ("[t]he Court * * * made it unmistakably clear that the exception would be applied * * * if the poisonous tree were an illegal arrest or search"). While petitioners may argue fervently that violations of the Fourth Amendment will be deterred if they prevail in this case, that argument has no more force than the argument made in *Nix* that Sixth Amendment violations should have been deterred by putting the police in a worse position than if the illegality had not occurred. No Member of the Court in *Nix* took the view that such a deterrence argument was sufficient to require suppression of evidence that would inevitably have been discovered.

---

[19] In any event, it is hardly clear that the inevitable discovery doctrine should be limited to derivative evidence. The independent source doctrine certainly is not so limited, and at least some courts and commentators think the inevitable discovery doctrine should not be. See 4 W. LaFave, *supra*, § 11.4(a), at 379-380 (discussing authorities on the question).

Petitioners press a third distinction between this case and *Nix* that is more substantial but, ultimately, is unpersuasive. They correctly note that *Nix* involved two independent lines of investigation that converged on the same evidence (Pet. Br. 11, 25, 26). Some lower courts have suggested that the inevitable discovery principles of *Nix* should be applied *only* when a separate investigation that ultimately would have led to the evidence was already under way when the illegality occurred. See *United States* v. *Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985); *United States* v. *Satterfield*, 743 F.2d 827, 845 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985); but cf. *United States* v. *Carrion*, 809 F.2d 1120, 1130 (5th Cir. 1987) (footnote omitted) (*Cherry* does not govern when "the plausible theories of causation * * * are no different from those in *Segura*"). Petitioners argue that the principles of *Nix* should not be applied here because the agents did not begin to prepare the warrant application until after the protective sweep.[20] Petitioners' argument is flawed in several respects.

First, as a factual matter, although the agents did not actually put pen to paper until they returned to the United States Attorney's office after the protective sweep, the investigation that led to the warrant was well under way before the initial entry into the warehouse. Throughout April 5 and 6, the agents were gathering facts to establish probable cause. Their investigation was leading inexorably to the

[20] Petitioners also allege (Br. 16 n.9, 31) that the agents did not even intend to get a warrant until they found marijuana in the warehouse. As we have noted several times, the findings of the district court are contrary to that allegation and are supported by the record.

procurement of a search warrant. The protective sweep was but a five-minute delay in a "line of investigation" that the agents had been "actively pursuing" (*Cherry*, 759 F.2d at 1204) long before the entry. Had that brief detour not been taken, the search warrant still would have been sought and issued, and the marijuana would have been found and seized.

Second, in both *Cherry* and *Satterfield* the challenged evidence was seized without a warrant during the illegal entry. See also *United States* v. *Owens*, *supra*. Accordingly, in those cases the question whether the evidence would have been discovered pursuant to a warrant if it had not been seized during the illegal entry required speculation.[21] It was in that context that the Fifth and Eleventh Circuits felt justified in depriving the factfinder of the opportu-

[21] In *Satterfield*, the agents conducted a full-blown warrantless search (rather than a protective sweep) during which they found and seized a gun. Although a warrant was eventually obtained, it was not the means by which the evidence was obtained; indeed, there is not even any indication in the court's opinion that the warrant was ever executed. 743 F.2d at 845. The distinction between the facts of *Satterfield* and the facts of this case may matter, contrary to petitioners' contention (Pet. Br. 38 n.35), because it is far more difficult on the *Satterfield* facts than on the facts of this case to believe that the warrant was anything other than an afterthought following a deliberate bypass of the warrant requirement. Petitioners' observation (*ibid.*) that a full-blown warrantless search and a brief but unjustified warrantless inspection are both illegal is correct, but beside the point. When the initial warrantless search is legal, no question of independent source or inevitable discovery arises. It is only when a court assumes or determines that the first search was illegal that questions of independence and inevitability arise. The scope of the first search has a significant bearing on those questions.

nity to determine what would have happened in the absence of the illegality by, instead, imposing a rule of law that there must have been a lawful "line of investigation" being actively pursued.[22]

This case is different. There is no doubt that the marijuana would inevitably have been discovered during a warrant-authorized search, because the agents intended from the start to get a warrant, did get a warrant, and seized the evidence pursuant to the warrant. The "active pursuit" requirement proposed by petitioners and adopted by the courts in *Cherry* and *Satterfield* has little use when evidence is ultimately obtained as a product of the untainted warrant rather than, as in those cases, in the course of the initial search. The main purpose served by the "active pursuit" requirement is that it increases the accuracy of the court's speculation regarding whether the evidence would inevitably have been discovered. The requirement that a lawful "line of investigation" was being "actively pursued" at the time of the constitutional violation may be helpful when, as in *Nix*, the evidence is obtained by virtue of the illegality and the court must then hypothesize as to whether the evidence would have been obtained by legal means had there been no police misconduct. But the "active pursuit" requirement serves little if any purpose when, as in this case and *Segura*, an untainted war-

[22] We doubt that such a rule of law is justified, even in the context in which it was imposed. The existence of a lawful line of investigation being actively pursued is a very important fact, but it is not the only fact, that the trial court should take into account when it makes the *factual* determination (see *Nix*, 467 U.S. at 444 & n.5) whether evidence would inevitably have been discovered in the absence of any illegality. See *United States* v. *Boatwright*, No. 85-1361 (9th Cir. July 20, 1987).

rant is obtained and the court can determine with certainty that the challenged evidence was seized pursuant to the warrant. "The fact that a warrant has been obtained removes speculation as to whether a magistrate would in fact have issued a warrant on the facts and also ensures * * * that the [F]ourth [A]mendment has not been totally circumvented." *United States* v. *Silvestri*, 787 F.2d 736, 745 (1st Cir. 1986), petition for cert. pending, No. 86-678; accord *United States* v. *Salgado*, 807 F.2d at 608-609 (distinguishing cases in which government seizes evidence without a warrant and then claims that "it would have gotten a warrant if it had asked for one" from cases in which evidence is first seen in a warrantless search and then seized pursuant to a warrant).[23]

Thus, although there are distinctions between *Nix* and the present case, the principles of *Nix* firmly support the judgment below. In this case, as in *Nix*, the government should not be put in a worse position than it would have occupied if no unlawful conduct had transpired. To put the same point in a slightly different way, petitioners should not be put in a better position than they would have been in if no

[23] In both *Silvestri* and *Salgado*, the courts upheld the admission of previously seen evidence on the basis of reasoning similar to that of this brief. As an intermediate step in its analysis, the *Silvestri* court suggested that evidence seen during a warrantless entry is "seized" when the officers then secure the premises pending acquisition of a warrant, whereas evidence that has not been seen is not "seized." We disagree with that intermediate step, but there is no need to belabor the point, since, as Judge Posner observed in *Salgado*, 807 F.2d at 607, the "seizure" question "is semantically intriguing but is unrelated to the policies that animate and limit the exclusionary rule."

unlawful conduct had transpired. Petitioners, whose guilt is beyond dispute, had been arrested at the time of the warrantless entry into the warehouse, and it was certain at that time that the agents would obtain a warrant and lawfully seize the marijuana. For purposes of analysis, we assume that the agents violated the Fourth Amendment in the interim before they obtained the warrant, but *Nix* teaches that petitioners should not be able to escape the consequences of their own misdeeds by using the agents' misconduct to escape from the chain of events that was inexorably leading to petitioners' conviction.

Nix contains one other important teaching for this case. It categorically refutes the contention—which is the major thrust of petitioners' brief—that the only effective way to deter police misconduct is to put police in a worse situation than they would have been in but for the misconduct (467 U.S. at 445-446):

> [W]hen an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. * * * In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement [or the more drastic measures petitioners propose] might produce.

Petitioners obviously do not agree with the Court's judgment in *Nix* that, in inevitable discovery situations, society can and should make do with disincentives to illegal police conduct that are less drastic than the exclusionary rule. The Court has made that judgment, however, and it has no less validity in this case than in *Nix*. Indeed, the disincentives to illegal behavior that the Court mentioned in *Nix* have considerable importance in the case of the two federal agencies involved here. The "confirmatory search" that petitioners predict will become routine is a deliberate breach of the warrant requirement.[24] Every federal agency engaged in law enforcement has procedures for disciplining those agents who conduct illegal searches in bad faith. For instance, in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984), the Court observed that "INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers." Although this scheme "cannot guarantee that constitutional violations will not occur, * * * it does reduce the likely deterrent value of the exclusionary rule" (468 U.S. at 1045). Accordingly, the Court held that the deterrent value of suppressing illegally seized evidence in deportation proceedings "must be measured at the margin" (*ibid.*).

---

[24] As such, a confirmatory search cannot be undertaken in good faith and does not give rise to qualified immunity in a civil damages action under 42 U.S.C. 1983 or *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). By contrast, a reasonably mistaken judgment about the existence of exigent circumstances (which is what is involved here, if there is any illegality at all) does not subject law enforcement officials to personal liability in damages. *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987). Thus, in a parallel context, the Court has recognized the greater need to deter actions such as confirmatory searches than to deter overzealous entries on the basis of perceptions of exigency, even though both involve Fourth Amendment violations.

Like the INS, the two agencies involved in this case also have extensive training programs on Fourth Amendment law for their agents. Both the DEA and the FBI send their agents to the FBI Training Academy, where they are lectured on search and seizure law. Both agencies have established guidelines for conducting arrests, searches, and seizures. Those guidelines stress the warrant requirement and limit the discretion of the agent to act without first seeking judicial authorization. They do not permit confirmatory searches. FBI Manual of Administrative Operations and Procedures, *Illegal Activities* para. (2) (May 16, 1980); DEA Personnel Manual § 2735.16(M)(5) (Sept. 13, 1985). Agents who deliberately flout the Fourth Amendment are subject to disciplinary action. FBI Manual of Administrative Operations and Procedures, *supra;* DEA Personnel Manual, *supra*, App. 2735A, at 3, Offense # 26. Moreover, agents are further deterred by the possibility of civil liability.

Furthermore, as we have noted, this is not a confirmatory search case, and its proper analysis does not turn on the question whether an exclusionary sanction is needed for deterrent purposes in such cases. In this case, the agents entered the warehouse shortly after arresting petitioners and their associates, in order to prevent the destruction of evidence. When Rooney's truck and the camper pulled out of the warehouse laden with marijuana at 2:05 p.m., the officers were able to see two men inside the warehouse. At approximately 2:30 p.m., another agent conducting surveillance saw a man pacing in front of the warehouse. After the agent drove around the block, the man disappeared. Accordingly, the agents believed that a brief warrantless entry into the warehouse to look for persons was justified by exigent circumstances. The protective sweep lasted only a few minutes and was confined to the purpose for which the agents entered. Neither court below decided the question of whether the facts established a valid case of exigent circumstances. But it is irrelevant, for remedial purposes, whether the agents properly assessed the degree of the exigency. Clearly, they believed they were acting lawfully and did not enter simply to save themselves the trouble of going to a magistrate in the event that the warehouse was empty, as petitioners suggest. Conduct of the sort at issue in this case is, at worst, based on a simple miscalculation of exigent circumstances rather than bad faith; that kind of conduct will not be deterred by suppressing evidence subsequently obtained pursuant to a valid warrant.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

JULY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 40440

SUPPLEMENTAL MEMORANDUM

(8) (7)

Nos. 86-995 and 86-1016

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-995

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1016

JAMES D. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of the United States, files this supplemental memorandum in order to bring to the Court's attention the decision in *United States* v. *Whitehorn*, No. 87-1122 (2d Cir. Sept. 29, 1987), which was not available in time to be included in the government's brief in chief (filed July 27, 1987).

This case is before the Court on a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, which upheld the admission of certain evidence seen during a warrantless search of a warehouse, but not seized until DEA and FBI agents obtained a warrant that would inevitably have been sought and issued even if the warrantless search had never taken

place. The First Circuit assumed, without deciding, that the warrantless search was illegal, but it followed the teachings of *Nix* v. *Williams*, 467 U.S. 431 (1984), and *Segura* v. *United States*, 468 U.S. 796 (1984), and admitted the evidence on the ground that the assumedly illegal search was not the cause of the government's acquisition of the evidence in question.

In seeking a writ of certiorari, petitioners relied heavily on a claim that the decision below conflicted with *United States* v. *Segura*, 663 F.2d 411 (2d Cir. 1981), opinion after remand, 697 F.2d 300 (1982) (Table), aff'd on other grounds, 468 U.S. 769 (1984). See 86-995 Pet. 13-14, 20; 86-995 Reply Br. 2. We agreed that there was a conflict between the decision below and the Second Circuit's *Segura* decision, which held (663 F.2d at 417) that evidence seen during an unlawful search must be suppressed even in circumstances in which evidence present in the place searched, but not seen during the unlawful search, was admissible under the independent source doctrine of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). See Br. in Opp. 15 n.8. We suggested, however (*id.* at 16), that it was "highly questionable" whether the Second Circuit would follow its earlier *Segura* decision after this Court's decision in *Nix* v. *Williams*, *supra*.

In its recent *Whitehorn* decision, the Second Circuit has in fact, on the basis of *Nix*, "disavow[ed] that portion of [its] decision in *Segura* that supports the proposition that evidence illegally discovered prior to a warranted search must necessarily be suppressed" (slip op. 5510). In *Whitehorn*, as in this case, certain evidence was seen during an assumedly illegal warrantless search but was not seized until the acquisition of a search warrant that inevitably would have been sought and obtained even if the warrantless search had never taken place. The Second Circuit rejected the argument that the observation of the evidence during the illegal search required its suppression,

and it upheld the admission of the evidence. The Second Circuit has thus joined the First, Fourth, Seventh, and Ninth Circuits—all of the courts of appeals that have decided the issue—in deciding that in cases of this type there is no tenable distinction between evidence first seen during the warrantless search and evidence first seen during the later, warrant-authorized search. See *United States* v. *Whitehorn*, 813 F.2d 646, 649-650 (4th Cir. 1987), cert. denied, No. 86-2013 (Oct. 5, 1987); *United States* v. *Salgado*, 807 F.2d 603, 607 (7th Cir. 1986), petition for cert. pending, No. 86-1386; *United States* v. *Merriweather*, 777 F.2d 503, 506 (9th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); Pet. App. 27a; accord *Segura* v. *United States*, 468 U.S. at 831 (Stevens, J., dissenting).

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60102

REPLY

BRIEF

Nos. 86-995 and 86-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JAMES D. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

A. RAYMOND RANDOLPH
Counsel of Record
SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

PETITIONERS' REPLY BRIEF

The Court granted certiorari to decide an issue concerning the inevitable discovery doctrine. The government, while continuing to insist that the inevitable discovery doctrine applies, now invokes the "independent source" doctrine and proposes a theory no state or federal court has relied upon in any similar case, a theory the First Circuit has itself rejected. *United States v. Silvestri*, 787 F.2d 736, 738-40 (1st Cir. 1986), pet. for cert. pending, No. 86-678. The government's positions are not only inconsistent.[1] They are untenable.

A.

THE GOVERNMENT'S INEVITABLE DISCOVERY ARGUMENT RESTS ON AN ERRONEOUS FACTUAL PREMISE AND MISSTATES THE LAW

1. We begin with the government's inevitable discovery argument. In support of its argument, the government

[1] The "independent source" doctrine allows admission of "evidence that *has been discovered* by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443 (1984) (emphasis added). The "inevitable discovery" doctrine, however, focuses on whether the same evidence "inevitably *would have been* discovered by lawful means" when it was not. 467 U.S. at 444 (emphasis added). See also *United States v. Silvestri*, *supra*, 787 F. 2d at 739, 740.

The government's explanation for relying on both doctrines is inscrutable (Gov't Brief, at p. 39):

> In a case such as this one, where the evidence was obtained as a result of a warrant-authorized search, the "independent source" doctrine is directly applicable. Yet, because the evidence in this case would have been discovered as a result of the warrant even if the warrant had for some reason not been executed, the inevitable discovery doctrine is applicable as well.

unveils a new "fact"—namely, that the agents decided to get a warrant for the warehouse before they broke into the building without one.[2] The government does not disclose who among the fifteen agents and the Assistant United States Attorney made this decision, where the decision was made, at what time it was made or what steps were taken to implement it before the illegal entry. The government does not reveal any of this because what it represents as fact is nothing more than fiction.

Our opening Brief, citing testimony at the pretrial hearing, indicated that the agents did not decide to seek a warrant until *after* they had illegally searched the warehouse and confirmed their suspicions about what might be there. Petitioners' Brief, at pp. 5-7, 30-31. The record does more than merely "support" what we said; it sustains no other view.

The testimony at the suppression hearing shows that before the agents broke into the warehouse on April 6, 1983, they had made no efforts to obtain a search warrant and had not even discussed any plans to do so. During that Wednesday afternoon, those running the investigation held two meetings in which they "got into detail as to what we intended to do; that is, what we were going to do next." Pretrial Tr. 3-8. Participating in the meetings were the prosecutor; the FBI Supervisor; the DEA Supervisor; FBI Agent Cleary, who served as the FBI case agent; and DEA Agent Keaney, who had tactical control over the DEA agents. Pretrial Tr. 3 (Cleary) (Second Day); 3-5, 3-6, 3-8, 3-38; JA 72. In those meetings no decision was made to seek warrant for the warehouse; in fact, the

[2] Gov't Brief, at pp. 16 & n.4, 17 & n.5, 42-43 & nn.20 & 21, 44. The new fact is revealed only in the Argument portion of the Brief. The government's recitation of facts in its Statement does not mention any decision by any agent to seek a warrant prior to the warrantless entry of the warehouse. See Gov't Brief, at pp. 2-6.

subject of a warrant was not even mentioned. JA 52.[3] The testimony quoted in the margin demonstrates that FBI Agent Cleary, who made the decisions for the FBI, was not aware of any discussions about getting a warrant at any time prior to the break-in. JA 52; Pretrial Tr. 3 (Cleary)(Second Day).

A review of the pretrial transcript shows the first conversation about seeking a warrant occurring *after* the break-in and the discovery of the marijuana. It was then, while the agents and the prosecutor were still inside the warehouse, that Agent Keaney conferred with his supervisor about going "to the U.S. Attorney's office and attempt[ing] to get a search warrant for the warehouse . . .." JA 60.[4] The detailed Report of Investigation in this joint FBI-DEA operation also shows that the "anticipation that application would be made for a Federal search warrant" did not arise until after the break-in. JA 35.

The prosecutor himself made the same assessment. He told the district court that the warrant-authorized search of the warehouse occurred "*as a result* of the warrantless

[3] Our citation is to the testimony of FBI Agent Cleary, who participated in both meetings. Pretrial Tr. 3-5, 3-6, 3-8 (Cleary). For the Court's convenience, we here set forth the pertinent portion of Cleary's testimony (JA 52):

> Q Was there any discussion of obtaining a search warrant for that warehouse prior to an agent or agents breaking into the warehouse?
> A Not by me.
> Q Were you aware of any discussions?
> A No, no.

[4] In the courts below, the government never maintained that the agents had decided to obtain a warrant to search the warehouse before they entered without one. The government's proposed findings of fact, which the district court adopted nearly verbatim, did not include any such finding. *See* Government's Consolidated Request for Findings of Fact and Memorandum in Support of the Denial of Various Motions of the Defendants to Suppress.

searches and the marijuana that was found pursuant to those warrantless searches." JA 47 (emphasis added); Petitioners' Brief, at pp. 8, 31.[5] The agents' conduct cannot be explained on any other basis. Before the illegal entry no one made the slightest effort to procure a warrant despite the facts that at least ten agents were available; the courthouse was but a short distance away;[6] the events took place on a weekday afternoon; and the agents were accompanied by the prosecutor, who could have provided any necessary legal assistance. See Petitioners' Brief, at pp. 3-8, 30-31.[7]

---

[5] The government's claim that the prosecutor was referring only to warrantless searches of *vehicles* is untenable. Gov't Brief, at p. 16 n. 4. One would have to believe the agents re-entered the warehouse with a warrant, not as a result of the marijuana they had discovered there, but only because marijuana had been found elsewhere, in vehicles. One would also have to ignore the transcript. The prosecutor told the district court that among the "warrantless searches" fitting his description was one of a "*place*" (JA 47). The only warrantless search of a "place" that uncovered marijuana occurred in the warehouse.

[6] Rule 41(c) of the Federal Rules of Criminal Procedure authorizes telephonic warrants, a procedure that requires only a "short time" even "if a magistrate is not nearby" (*Steagald v. United States*, 451 U.S. 204, 222 (1981)), as she was in this case. One of the primary purposes of this procedure is to discourage warrantless—and possibly unconstitutional—searches to prevent the destruction of evidence. See Fed. Rules Crim. Pro. 41(c)(2), Notes of Advisory Committee on Rules, 1977 Amendment, *reprinted in* 18 U.S.C.A., Rule 41, Fed. R. Crim. Pro., 1987 Supp. at 161-63. See also *United States v. McEachin*, 670 F. 2d 1139, 1147 (D.C. Cir. 1981); *United States v. Cuaron*, 700 F. 2d 582, 589 (10th Cir. 1983); *United States v. Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983).

[7] While assuming, as it must, that the agents violated the Fourth Amendment when they searched the warehouse without a warrant, the government nevertheless tries to justify their conduct. *E.g.*, Gov't Brief, at pp. 48-49. The court of appeals concluded that "the government's position is uphill" (Pet. App. 24a)—and for good reason.

Each arrest occurred far out of sight of the warehouse. The agents had nothing to indicate that there was anyone in the warehouse or

The government insists that we have misstated the facts[8] because the agents actually had determined to get a warrant before they forced their way into the warehouse (Gov't Brief, at pp. 16 & n.4, 17 & n. 5, 42-43 & nn.20 & 21, 44). The government, however, neither confronts the evidence we have recited above, nor cites any testimony or documents to support its statement. It relies instead on supposed "factual findings of the lower courts" (Gov't Brief, at p. 15; id. at 9). But one of those "lower courts"—the district court—made no factual findings regarding when the agents first decided to seek a warrant.[9] This much the

---

elsewhere who had been alerted to the arrests. They had no evidence that the warehouse contained anything but bales of marijuana. They knew that such material could not be discarded or destroyed. JA 78-79. A warrant was readily available. The DEA Supervisor explained that he nevertheless forced his way into the warehouse because the agents on surveillance had given him no reason not to do so. JA 77. That is the opposite of what the Fourth Amendment requires. See, *e.g.*, *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Segura v. United States*, 468 U.S. 796, 820 n.5 (1984)(dissenting opinion). In these circumstances, the warrantless search of the warehouse, which surprised the FBI case agent when he learned about it (JA 53), constituted a blatant *per se* violation of the Fourth Amendment.

[8] Gov't Brief, at p. 16 n.4. In the same footnote, the government also quibbles with our estimate of how long agents were going in and out of the warehouse. We relied on the fact that, after arresting Murray and Carter, all but two of the agents at the parking lot left for the warehouse and entered the building about 2:40 p.m. or 2:45 p.m. JA 49; Pretrial Tr. 9-7; Trial Tr. 2-43-44. The two remaining agents arrived about 2:50 p.m. and took turns going inside. JA 59-60. They thought this took a total of 3 minutes. Pretrial Tr. 3-46. Still another agent, who had been posted outside, went into the building for about 2 minutes. Pretrial Tr. 9-8. The estimate in our Brief (at p. 30) was therefore "about 10 to 15 minutes."

We were not more certain because the district court found that the "times stated are very approximate" and expressed doubt about the agents' "concept of time" in "terms of minutes." Accordingly the district court issued no finding about how many minutes elapsed between entry and exit. Pet. App. 42a-43a.

[9] The government never asked the district court to make such a

government grudgingly concedes in a footnote after implying the opposite in the text of its Brief.[10] That leaves only the court of appeals to lend credence to the government's factual proposition. But the court of appeals quite obviously would not and did not issue findings of fact on this subject or any other.[11] *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

The government also attempts to prove its version of the facts by devising a maxim: when officers enter premises without a warrant for the purpose of preserving evidence this "necessarily presupposes that those persons making the entry already (at the time of entry) contemplate a later search for the evidence so preserved"; that

finding, although it had the burden of showing independent source or inevitable discovery. *See Nix*, 467 U.S. at 444.

[10] Gov't Brief, at p. 17 n. 5; but see *id.* at p. 42 n.20.

[11] The government misconstrues two conclusory statements in the appellate court's opinion. The first is (Pet. App. 27a):

> Put another way, we can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of the warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant.

The second is (Pet. App. 28a):

> This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued.

Neither of the court's statements constitutes a "finding of fact." Both merely reflect two undisputed propositions: that the magistrate would have issued the warrant even without the illegal search because the affidavit did not reveal the earlier entry; and that before the warrant issued, the possibility was slight—or in the court's word, "nil"—that the evidence would be destroyed. By no stretch of the imagination does it follow from either proposition that the agents collectively or individually decided to seek a warrant before they broke into the warehouse.

"later search," the government assumes, will be with a warrant; therefore, when the agents in this case entered the warehouse without a warrant they must already have decided to seek one. Gov't Brief, at pp. 16-17 n.4 (last paragraph); 17-18 n.5.

The argument is baffling, particularly since "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts." *Nix v. Williams*, 467 U.S. 431, 444-445 n.5 (1984); *United States v. Cherry*, 759 F.2d 1196, 1205 n.10 (5th Cir. 1985)("If the inevitable discovery exception can be applied only on the basis of the police officer's mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact."). Why agents "necessarily" would be "contemplating" a later search for "the evidence so preserved" is not apparent. One would have thought agents do not generally anticipate having to conduct "a later search" for something they have already found. Indeed, when they lawfully enter premises and discover evidence of a crime in plain view, the Fourth Amendment does not require them to get a warrant for that evidence. *See Arizona v. Hicks*, ___ U.S. ___, 107 S.Ct. 1149, 1153 (1987)("the practical justification" for this exception is "sparing police" the "inconvenience" of "going to obtain a warrant.") It is far more likely that agents acting lawfully will reserve any decision about getting a warrant until they see what is inside. The most that can be said is that sometimes they will seek a warrant later and sometimes they will not.[12]

2. If the government prevails in this case, however, officers about to make a warrantless entry in violation of

[12] See, *e.g.*, the following cases in which officers conducted warrantless searches for the purpose of preventing the destruction of evidence and did not later seek a warrant: *United States v. Gallo-Roman*, 816 F. 2d 76 (2d Cir. 1987); *United States v. Andersson*, 813 F.2d 1459 (9th Cir. 1987); *United States v. Johnson*, 802 F.2d 1459 (D.C. Cir. 1986); *United States v. Moore*, 790 F.2d 13 (1st Cir. 1986).

the Fourth Amendment would be well-advised to step back and "contemplate" a later search with a warrant. Under the government's theory, such contemplation will render admissible whatever evidence they discover in violation of the Fourth Amendment. The script set forth in our opening Brief (at pp. 40-41) attempted to make the point that even if the factual premise of the government's inevitable discovery argument existed here, which it does not, the need for suppression would be just as compelling.

The one certain fact in all search-illegally-first-get-the-warrant-later cases is that the officers have decided *not* to obtain a warrant before conducting their search. To hold, as the government urges, that the exclusionary rule is inapplicable if those officers later procure a search warrant for the same premises and take away what they have illegally discovered is to render the warrant process an empty formality[13] and to contravene the Fourth Amendment's requirement that a warrant must be obtained *before* the search.[14]

---

[13] We argued that in such circumstances "[w]arrants would no longer function as prior authorizations to search, as the Framers intended, but as exhibits to be held up as proof of inevitability" (Petitioners' Brief, at p. 42). That is indeed the function ascribed to the warrant issued in this case. See Gov't Brief, at p. 45.

We also argued that agents would be encouraged, if not instructed, to engage in "duplicity" in their warrant affidavits by omitting the material fact that they have already found the evidence they seek. The government describes this distortion of the warrant process as "commendable." Gov't Brief, at p. 29 n. 13.

[14] See *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)(the government's position "would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place"); and the cases cited in our opening Brief, at pp. 19-20 n. 13.

The government errs in its Supplemental Memorandum (at p. 3) when it claims that only the First, Second, Fourth, Seventh and Ninth Circuits have decided the question presented in this case and have done so in a way favorable to the government. The Fifth, Sixth, Tenth and

3. Relying on statements in *Nix*, the government contends that officers should not be put in a worse position because of their violation of the Fourth Amendment. Gov't Brief, at pp. 40-41, 46-48. The Court in *Nix*, however, carefully confined its remarks. The Court took for granted that the direct products of police illegality would be suppressed and discussed only whether derivative evidence, found later, should be as well. See Petitioners' Brief, at pp. 25-28. This is why the Court could assume that officers will not be "in a position to calculate whether the evidence sought would inevitably be discovered," 467 U.S. at 445, an assumption that cannot be made in search-first-warrant-later cases. In such cases, the police invariably will be in a position to make that calculation; in the government's view of "inevitability," they control the course of events. To hold that the exclusionary rule does not apply when they choose an illegal course—a mere "detour" as the government describes it (Gov't Brief, at p. 43)—would be to distort *Nix* beyond recognition.[15]

The government's message, repeated in various forms, is simply that officers, in order to insure admissibility of illegally discovered evidence, must first announce among themselves or formulate in their minds a decision to seek

---

Eleventh Circuits, as well as numerous state courts, have also decided the question and decided it against the government. See our opening Brief, at pp. 19-20 n. 13.

[15] The government's claim that police should never be put in a worse position because of their violation of the Fourth Amendment is contrary to the fundamental principle of the exclusionary rule. Although the authors of the government's Brief appear to be dissatisfied with that rule, the current Director of the FBI is not. See the confirmation hearing of William B. Sessions to be Director of the Federal Bureau of Investigation, S. Exec. Rep. 100-6, 100th Cong., 1st Sess. 5-6 (1987)(quoting his testimony that he is generally "happy with [the exclusionary rule] the way it is").

The government also appears to suggest that the inevitable discovery doctrine should turn on whether the agents acted in good faith (but see n. 7 *supra*). *Nix* rejected that approach. 467 U.S. at 431.

a warrant and only then break down the door and conduct their illegal search. As the government unrolls its supporting arguments, one fundamental defect emerges time and again—the government's complete disregard of the purposes of the Warrant Clause and of the exclusionary rule which ensures compliance with that constitutional provision.

4. Nowhere is this more apparent than in the government's criticism of our arguments distinguishing between evidence discovered during the illegal search and other evidence, found only later pursuant to a warrant-authorized search—or, as the government puts it, between previously "seen" and previously "unseen" evidence. *E.g.*,Gov't Brief, at pp. 24, 29. The distinction is scarcely novel. The government itself contended for it in *Segura v. United States*, 468 U.S. 796 (1984), arguing that unseen evidence was different and should not be suppressed because "police cannot actually 'seize' a particular movable object in the ordinary sense of the word when they have not even discovered it yet . . .."[16] Moreover, in *Arizona v. Hicks*, *supra*, as in other cases dealing with the proper scope of warrantless searches, the Court's decision turned on the difference between evidence seen during the warrantless entry and evidence that remained hidden from plain view. To contend that there should be no distinction, that all the evidence on the premises should be excluded regardless whether the police illegally discover it, would be to ask that *Segura* be overruled. That is not what we urge. We accept *Segura* and argue only that the exception recognized in that decision not be allowed to swallow the rule, which is what the government now proposes.

Moreover, the government's failure to see any "rational basis" or "persuasive explanation" for distinguishing between illegally discovered evidence and evidence not found until later (Gov't Brief, at pp. 22, 24), indicates only that the government has not looked very far.[17] Unless courts exclude evidence unlawfully discovered in plain view or in a more extensive inspection, the deterrent effects of the exclusionary rule would be completely undermined.[18] If making no distinction between what is found during an unlawful warrantless entry and what is discovered only later means that *none* of the evidence should be suppressed, as the government contends, there will be nothing left of the Warrant Clause. Experience proves that the

[16] Brief for the United States, No. 82-5298, October Term 1983, at p. 16 n. 9; see also the government's oral argument in *Segura*, quoted in note 17 *infra*.

[17] The government was more perceptive when it argued *Segura* in this Court. In addressing the question whether the result ultimately reached in *Segura* would undermine the deterrent effect of the exclusionary rule, the government's attorney had this to say (Transcript of Oral Argument, at 46):

> There are several things to say about that. The first is that this is a situation which does not inherently—The rule for which we contend does not inherently lend itself to encouraging flagrant violations of the Fourth Amendment because the more clear it is to the police that there are no exigent circumstances the less they have to gain by entering the premises rather than waiting for the warrant which they fully believe they have probable cause to get and will get.
>
> When they enter the premises they can only have the benefit of evidence that is held not to be a fruit of the entry so under the holding of the Court of Appeals in this case and as I think Justice O'Connor pointed out earlier they still run the substantial risk that evidence that is found during the original unlawful entry if it is unlawful will be suppressed.

[18] See *Segura v. United States*, 468 U.S. at 812 (Chief Justice Burger, joined by Justice O'Connor)("officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case"); *id.* at 830 (Stevens, J., joined by Justices Brennan, Marshall and Blackmun, dissenting)("exclusion is required to remove the incentive for the police to engage in the unlawful conduct"); *id.* at 831 n.25; see also the many state and federal decisions cited and discussed in our opening Brief, at pp. 19-20 n.13., pp.29 & n.29, 43-45 & n.43.

"power of doing wrong with impunity seldoms waits long for the will . . .." Samuel Johnson, *Observations on the Present State of Affairs*, in 10 *The Works of Samuel Johnson* 191 (Yale Edition 1977).

B.

THE EVIDENCE DID NOT STEM FROM AN INDEPENDENT SOURCE

1. In the "independent source" portion of its Brief, the government sets out to show lack of "causal connection." It does this by arguing that *if* the agents had not searched the warehouse without a warrant, they would have searched it with one.[19] The argument is useless. Far from demonstrating that the evidence was not the product of the illegal search, as the government supposes, it demonstrates nothing. Whenever officers, on the basis of probable cause, target premises for a search, they can realize their objective in but two ways: by searching without a warrant or by searching with one.[20] To say that even *if* they had not acted illegally, they would have obtained the evidence by acting legally is merely to restate this truism. We too could argue that even *if* the agents had not conducted a warrant search, they still would have procured the evidence through their illegal search, as they did; therefore there was no causal connection between the evidence and the warrant search.

---

[19] *E.g.*, Gov't Brief, at p. 23 ("Had the protective sweep never occurred, the contraband would have been seized pursuant to the warrant in precisely the same way."); id. at p. 43 ("Had that brief detour [the illegal search] not been taken, the search warrant still would have been sought and issued, and the marijuana would have been found and seized.").

[20] One of the fundamental purposes of the exclusionary rule is to ensure that the officers comply with the Fourth Amendment by following the latter course.

The problem is with the "if." The hypothesis about what would have happened in the absence of illegal conduct simply restates the point that since the officers already had probable cause, a magistrate doubtless would have issued a warrant. But as we argued in our opening Brief (at pp. 32-33), the Court has, without fail, protected Fourth Amendment rights even though "the same result might have been achieved in a lawful way." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385,392 (1920). An officer has a "duty to go before a neutral magistrate" for authorization to search no matter how firm his conviction that probable cause exists; that may be bothersome, but "the Warrant Clause embodies our government's historical commitment to bear the burden of inconvenience." *Texas v. Brown*, 460 U.S. 730, 750 (1983)(Stevens, J., concurring, joined by Justices Brennan and Marshall).

2. The balance of the government's presentation is just as untenable. The Court is told that although officers must have the magistrate's authorization before entering, the evidence they illegally discover in disregard of the Warrant Clause is admissible so long as they "seize" it when the warrant arrives later. According to the government, the seizure authorized by the warrant is an "independent source" for the evidence, breaking its direct link to the illegal search. That violation of the Fourth Amendment—a mere "detour" from the path leading to the magistrate's chambers—is of no consequence because the evidence was not really "obtained" at that time. (Gov't Brief, at pp. 25-27).

Later in its Brief, however, the government appears to contradict itself, telling the Court that whether the evidence was actually seized before the warrant arrived is irrelevant because the question has nothing to do with the policies of the exclusionary rule. Gov't Brief, at p. 45 n.23. We are not sure what to make of all this. We are puzzled too by the government's statement that "petitioners [do not] argue that the bales of marijuana were 'seized' before

the untainted warrant was executed." *Id.* at p. 14. That misrepresents our position.[21] We have contended and continue to maintain that the evidence illegally discovered in the warehouse was seized, obtained, gathered, procured and taken into custody at that time. We know the government disagrees but it is impossible to ascertain why; its Brief does nothing but assert that no seizure then occurred.[22] The law and the facts are otherwise.

Whenever the government meaningfully interferes with a person's possessory interests in property it has "seized" that property. See, *e.g.*, *Maryland v. Macon*, 472 U.S. 463, 469 (1985); *United States v. Karo*, 468 U.S. 705, 712-13

---

[21] See Petitioner's Reply Brief, No. 86-995, at pp. 7-8, when this case was at the certiorari stage; and Petitioners' Brief, at pp. 38-39 n.36. We did not address the point at any earlier stage of this case because the government never raised it.

[22] In describing the marijuana, the government coins a phrase—"primary fruit"—that garbles several concepts and, so far as we can tell, has never been used by any federal court. See, *e.g.*, Gov't Brief, at pp. 24-28. The government's quarrel seems to be with the statement in our Brief (at pp. 16-18) that the evidence illegally discovered in the warehouse constituted "primary evidence." But in that respect, we simply adhered to the government's own formulation in another case, which accurately states the law:

> The exclusionary rule generally provides that evidence obtained as the direct result of a violation of a defendant's Fourth Amendment rights should be suppressed. For example, evidence discovered in the course of an illegal search ordinarily should be excluded. See, *e.g.*, *United States v. Chadwick*, 433 U.S. 1 (1977). Such evidence is sometimes called "primary evidence" because it is discovered while the Fourth Amendment violation is occurring. See 3 W. LaFave, *Search and Seizure* § 11.4, at 612 (1978). In addition, evidence that is subsequently discovered through exploitation of a prior constitutional violation is subject to suppression as the "fruit of the poisonous tree" (*Nardone v. United States*, 308 U.S. 338, 341 (1939)). See, *e.g.*, *Brown v. Illinois*, 422 U.S. 590 (1975). . ..

Brief for the United States in *Segura v. United States*, No. 82-5298, Oct. Term 1983, at p. 13.

(1984); *United States v. Jacobsen*, 466 U.S. 109, 120-21, 124-25 (1984); see also *Segura v. United States*, 468 U.S. 796, 822 (1984)(Justice Stevens, dissenting, joined by Justices Brennan, Marshall and Blackmun). That the agents here meaningfully interfered with petitioners' possessory interests is evident. At least ten agents went inside the building on that Wednesday afternoon; for the next eight hours, several of these agents stood guard at the entrance to the building. Their purpose, as the government emphasizes, was to interfere with petitioners' possessory interests, to secure the evidence and thereby prevent its removal or destruction. If that does not amount to a "seizure" then the word has lost all meaning and we are dealing with some metaphysical concept the government has yet to explain.[23]

Having said this, we find ourselves in agreement with the government's footnote (Gov't Brief, at p. 45 n.23) that the essential considerations are not rules defining seizures but the policies of the Fourth Amendment and the exclusionary rule. Once agents or officers illegally enter premises and exercise control over the items they discover, what they do with those items is up to them. Under the Fourth Amendment it should make no difference whether, after finding items during an illegal search, the agents or some of them surround the items, pick them up or simply keep watch over them; the evidence should be suppressed even though a warrant arrives sometime later. See Petitioners' Brief, at pp. 38-39 n.36. As *Segura* holds, the warrant if untainted will permit the agents to search, seize

---

[23] As indicated above, the First Circuit held in *United States v. Silvestri*, 787 F.2d 736, 738-40 (1st Cir. 1986), pet. for cert. pending, No. 86-678, that "the independent source exception cannot be applied" in search-first-warrant-later cases. As to the question of "seizure," the court ruled that "[t]he conjunction of observation of specific objects and the assertion of control over those objects via the 'securing' of the property sufficiently affects possessory interests in those particular objects to amount to a seizure." 787 F. 2d at 740.

and introduce whatever else they find on the premises. The items they previously discovered without a warrant, however, must be excluded not only to deter entries in violation of the Fourth Amendment, but also to confine the scope of the unlawful searches that necessarily follow.

3. The dissenting opinion in *Segura* does not support the government, as it claims. The four dissenting Justices maintained that there were "two constitutional violations that occurred" in *Segura*—the illegal entry and the agents' remaining on the premises—and that "a remedy for both is appropriate." 468 U.S. at 817. The government's argument in this case is that there should be no remedy even for the illegal entry. The concern of the dissenters in *Segura* was that the majority's decision would "provide government agents with an incentive to engage in unconstitutional violations of the privacy of the home." *Id.* at 817. If the Court adopted the government's position in this case, there would be a far greater incentive for officers to engage in violations of the Fourth Amendment. They would have everything to gain and nothing to lose. If they find something worthwhile, they can always seek a warrant later in order to guarantee that the evidence will be admitted. If they are denied a warrant because they did not have sufficient probable cause, they have lost nothing. On the other hand, if the premises are empty, they have saved themselves the inconvenience of having to visit the magistrate before conducting their search.

4. This brings us to the government's suggestion that perhaps only "confirmatory" searches should result in suppression and that what occurred here does not fit that description. It is worth examining precisely what the government says in this regard (Gov't Brief, at p. 34):

> In the present case, the trial court had already made findings of fact that are inconsistent with the proposition that the warrantless search was confirmatory in purpose; rather, the purpose of

> the initial entry was to prevent the destruction of evidence (Pet. App. 42a) pending the acquisition of a warrant.

There are several things wrong with the quoted statement.

First, the trial court made no finding whatsoever that the warrantless entry was "pending the acquisition of a warrant." As we have discussed, the government did not even propose such a finding to the trial court and the evidence would not have supported such a finding in any event. The agents decided to go to the magistrate only after they forced their way into the warehouse. See p. 3 *supra*.

Second, searches "to prevent the destruction of evidence" most certainly can be confirmatory, as this case shows. The illegal search of the warehouse confirmed that no one was inside. But it also confirmed that the warehouse contained evidence. Before entering, the agents only suspected that marijuana would be found. After forcing the door open, they knew to a certainty they had aimed at the right target.

Regardless of the agents' purpose before their illegal entry, the direct link between their violation of the Warrant Clause and the evidence remains. To conclude otherwise, one would have to believe that the agents were thinking along the following lines as they forced the warehouse door open: "After we enter this building we are going to seek a warrant to search it for marijuana. We are going to carry out that decision no matter what we find inside. If we discover that the building contains no marijuana, we will nevertheless go to the magistrate, swear we have probable cause to believe the opposite and, when the warrant issues, search the building again for something we already know is not there."

Third, the government's argument conflicts with the decisions of this Court. By focusing on the agents' state of mind and contending that the evidence should not be ex-

cluded because their unlawful actions were not "confirmatory in purpose,"[24] the government ignores decisions such as *Katz v. United States*, 389 U.S. 347, 358-59 (1967), and *United States v. United States District Court*, 407 U.S. 207 (1972). In neither *Katz* nor *United States District Court* were the agents conducting warrantless searches for the purpose of determining whether to get a warrant. In *Katz* itself, the agents' purpose was to preserve evidence, which is why they recorded Katz's conversations. 389 U.S.at 353, 354 n.14. But in both cases the Court nevertheless rejected the government's argument, repeated here, that obtaining a warrant after the search should result in the admissibility of the evidence previously discovered without a warrant. 389 U.S. at 358-59; 407 U.S. at 318-21.

The Court's rulings in those cases and others stems from a firmly-established constitutional principle—to hold "that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948). That principle, which the government would cast aside, controls the decision in this case.

---

[24] It is not clear whether the government is referring to some collective state of mind or to the intent of individual agents. Certainly not all the agents entered the warehouse to perform a "protective sweep." The three agents who walked through the building only after the others had gone inside (see Petitioners' Brief, at pp. 30-31) were not engaged in preventing the destruction of anything.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening Brief, the judgment should be reversed.

Respectfully submitted,

A. RAYMOND RANDOLPH
Counsel of Record

SUSAN L. LAUNER
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Counsel for Petitioners

AMICUS CURIAE

BRIEF

No. 86-995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL F. MURRAY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

LARRY W. YACKLE
(*Counsel of Record*)
BOSTON UNIVERSITY SCHOOL OF LAW
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

JOHN A. POWELL
DAVID B. GOLDSTEIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

JOHN REINSTEIN
CIVIL LIBERTIES UNION OF MASSACHUSETTS
47 Winter Street
Boston, Massachusetts 02108
(617) 482-3170

QUESTION PRESENTED

Whether evidence discovered as the direct and immediate product of an unlawful, warrantless search by federal agents can nonetheless be admitted into evidence merely because the agents did not disturb the evidence upon finding it initially, but, instead, returned to seize it after obtaining a search warrant issued by a magistrate who was not informed of the initial unlawful search?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and liberties guaranteed by law. The Civil Liberties Union of Massachusetts is one of its state affiliates.

The ACLU and its affiliates have long worked to protect the rights of criminal defendants and have filed many briefs, as counsel for a litigant or as amicus curiae, in criminal cases requiring the interpretation of federal constitutional provisions and related federal doctrines.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of the petitioner.

STATEMENT OF THE CASE

In this case, an Assistant United States Attorney and approximately fifteen agents of the Federal Bureau of Investigation and the Drug Enforcement Agency descended upon a warehouse in South Boston. Acting without a warrant, the supervising DEA agent forced the locked door open with a tire iron, permitting at least ten agents to enter. The agents swept through the warehouse, looking into vehicles and going through an office. They observed several bales covered with burlap and tentatively identified the contents as marijuana. The agents then left the warehouse. Several officers were stationed outside to keep the building under surveillance, and two others went with the Assistant U.S. Attorney to his office.

Seven hours later, those agents prepared an affidavit seeking a search warrant for the

warehouse. The affidavit included information derived from other FBI and DEA activities and did not mention that the agents had, in fact, already searched the warehouse without authority. Relying on that affidavit, and in ignorance of the prior unlawful search, a magistrate issued a search warrant for the warehouse at about 10:30 p.m. The agents executed the warrant a half hour later and at that time seized the marijuana they had discovered earlier in the day.

The United States District Court for the District of Massachusetts rejected a defense motion to suppress the marijuana.[1] The defendant, Michael F. Murray, was thereafter

---

1. The district court held that Murray lacked standing to object to the entry of the warehouse and that, if he had standing, the intrusion was not a search within the meaning of the fourth amendment. The circuit's judgment supersedes the district court's alternative holdings, making the adequacy of the ground of decision discussed in the text the only issue before this Court.

convicted of conspiracy in connection with the marijuana. The Court of Appeals for the First Circuit sustained the district court's refusal to exclude the marijuana, but substituted a single basis of decision: conceding that the warrantless entry of the warehouse was an unlawful search, the marijuana initially found in that way was nevertheless admissible at trial because the later search and seizure under the authority of the warrant constituted an independent source for the evidence. The circuit court also noted that its judgment was fortified by the "inevitable discovery" doctrine.

This Court then granted Murray's petition for certiorari to determine whether the lower courts properly admitted evidence which, by all accounts, was discovered as the direct and immediate result of a search in violation of Murray's fourth amendment

rights.[2]

SUMMARY OF ARGUMENT

We first explain that the second search of the warehouse was not an independent source for the marijuana introduced at Mr. Murray's trial simply because, during the period between the two searches, DEA agents obtained a warrant from a magistrate who had no knowledge of the prior, unlawful search. The circuit court reasoned that the agents' mere failure to rely explicitly upon the fruits of the first search in obtaining the warrant established that the warrantless

2. The identical fourth amendment issue is raised in Carter v. United States, No. 86-1016. What we say with respect to this case is equally applicable to Carter. Inasmuch as the United States has not cross-petitioned in either Murray or Carter, only the fourth amendment issue described in the text is before this Court for decision.

entry did not contribute to the rediscovery of the marijuana in the second search. That analysis unjustifiably assumes, however, that the discovery of marijuana in the first search played no role in the decision to seek a warrant thereafter.

The record indicates, by contrast, that the initial discovery of the marijuana in this instance was critical to the agents' later behavior. If, in their initial search of the warehouse, the agents had found nothing of value, they would never have sought a warrant. They would hardly have gone through the motions of obtaining authority to search a warehouse they knew concealed no evidence. If the exclusionary rule is to be invoked seriously to discourage violations of the fourth amendment, it must be brought to bear here, where federal agents and an Assistant United States Attorney, who were aware of controlling legal standards,

nevertheless searched first and sought authority later.

Second, we explain that the inevitable discovery doctrine cannot support the admission of the marijuana. An attempt to invoke that doctrine in this case must posit that the marijuana was obtained unlawfully and not by lawful means constituting an independent source. Any contention under the inevitable discovery rubric is, accordingly, mutually exclusive of the claim that the second search here constituted such a legal, independent source.

Next, we indulge the circuit court's apparent belief that the second search supplies evidence that, but for the original unlawful discovery of the marijuana, the same evidence would inevitably have been obtained anyway in a later, lawful search. Any such analysis fails because the prosecution has not established by a preponderance of the

evidence that any independent investigation, underway at the time the marijuana was in fact obtained unlawfully, would inevitably have produced it lawfully.

Certainly, the marijuana cannot be held admissible on the theory that the very agents who participated in the blatantly unconstitutional forced entry of the warehouse in the afternoon would inevitably have sought a warrant and searched later in a lawful manner. The fact that those agents conducted an unlawful search in the first instance demonstrates that they regarded the warrant process as a means for deodorizing their behavior should their violation of the fourth amendment turn up evidence that would be useful in court. Moreover, there is no evidence that a warrant could not have been obtained prior to the initial search or that efforts to obtain such a warrant were underway when that search was made.

Finally, we explain that the circuit's reliance on the inevitable discovery doctrine in this case constitutes a dramatic and unjustifiable extension of that doctrine. In order to preserve the deterrent effect of the fourth amendment exclusionary rule, the inevitable discovery doctrine should not be invoked in fourth amendment cases at all. If the doctrine is applied to fourth amendment cases, it should be available only with respect to derivative, as opposed to primary, evidence.

ARGUMENT

I. THE SECOND SEARCH OF THE WAREHOUSE DID NOT CONSTITUTE AN INDEPENDENT SOURCE FOR THE MARIJUANA MERELY BECAUSE THE AGENTS OBTAINED A WARRANT DURING THE INTERIM BETWEEN THE TWO SEARCHES

It is a legal truism that only evidence derived from a violation of the fourth amendment is inadmissible under the exclusionary rule announced in Weeks v. United States, 232 U.S. 383 (1914). There can be no question, however, that the marijuana at issue in this case was produced by an unreasonable search. No one contends in this Court that the DEA agents respected Murray's fourth amendment rights when they broke open the warehouse and intruded into

his privacy without benefit of a warrant.[3] It is plain that this intrusion constituted a flagrant violation of the fourth amendment by federal agents whose routine work demands familiarity with the constitutional standards they are duty-bound to meet.

The government nevertheless attempts to trivialize the agents' glaring constitutional wrong. Thus the government dismisses the initial discovery of the marijuana in an unlawful search as "an irrelevant happenstance" and insists that it is somehow significant that the agents did not compound their error by then and there seizing evidence they had discovered unconstitutionally. Brief for the United

3. The government argued below that the warrantless search was justified by exigent circumstances. The First Circuit did not rest on that claim. The government's failure to cross-petition on the issue forecloses such a contention here.

States in Opposition to the Petition for Certiorari, at 14.[4]

The gravamen of the constitutional violation was, of course, the agents' unwarranted acquisition of private information that Murray, as a matter of constitutional right, wished to keep to himself. United States v. Karo, 468 U.S. 705 (1984). When the agents forced open a locked door, invaded the warehouse, and gathered such information (of evidentiary value or not and for whatever purpose), they trampled upon the substantive liberty vouchsafed by the fourth amendment. That unconstitutional

4. No plausible argument can be made that the entry into the warehouse was necessary to secure the building in anticipation of a search to come later. While law enforcement officials are clearly entitled to take precautions, short of a search, to maintain the status quo until they can obtain a warrant for a lawful intrusion, it is circular to propose that those precautions can include the very search for which a warrant is constitutionally required.

intrusion, in turn, triggered the agents' later decision to obtain a warrant for a second search. If, then, the constitutional proscription of unreasonable searches is to be enforced by excluding evidence found in violation of the fourth amendment, this is an appropriate case in which to invoke Weeks.

A. The initial, unlawful discovery of the marijuana played a vital role in the agents' decision to seek a warrant

The exclusionary rule cannot be skirted on the ground that the second search of the warehouse constituted an independent source of the marijuana. Any such argument must depend upon a determination that the agents' decision to seek a warrant was wholly unaffected by their success in finding evidence of crime in the first, unlawful search. Yet no court has made any such

determination.[5] It defies common sense to believe that the agents ignored the knowledge that marijuana was stored in the warehouse and sought authority to search wholly on the basis of other evidence establishing only probable cause to believe that marijuana was located there. The government's bald assertion that the unlawful discovery of the marijuana "contributed nothing" to the agents' decision to seek a search warrant is

5. The First Circuit said that it was "certain" that the warrantless search "in no way contributed in the slightest either to the issuance of the warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant." United States v. Moscatiello, 771 F.2d 589, 603 (1st Cir. 1985). By this, the circuit clearly meant only that the agents did not mention the first search to the magistrate and that there was no one in the warehouse in the afternoon to remove the marijuana before the agents returned to search again that evening. The circuit said nothing about whether the agents' decision to seek a warrant was related to their actual knowledge, gained unlawfully, that the marijuana was there to be found.

as implausible as it is unsupportable on this record. Brief for the United States, supra, at 12.

It is all well and good to underscore an uncontested fact: the agents did not explicitly refer to the information they discovered in the initial, unlawful search in order to persuade the magistrate that they had probable cause to search the warehouse. Yet it hardly follows that there was no link between the first search and the second. There was a link. The agents obtained the warrant in hopes it would deodorize their wrongful behavior and preserve the fruits of an unreasonable search for use at trial.

To believe otherwise is to believe that the agents would have obtained a warrant and searched the warehouse in the evening even if they had found nothing of value there in the afternoon. The government has hardly offered to prove any such thing. Federal agents are

many things, but they are not wastrels who squander scarce time and resources on fools' errands. The suggestion that the first search "contributed nothing" to the second search and that the second search therefore constituted a lawful source for the marijuana independent of the first search must, accordingly, be rejected.

In Segura v. United States, 468 U.S. 796 (1984), this Court drew two clear distinctions: (1) between primary evidence discovered as the result of an unconstitutional search and other evidence obtained later in a valid search; and (2) between evidence derived from an unlawful search and evidence obtained by way of an independent search not linked to a previous, unlawful intrusion. Now, a bare three years later, the government would have the Court ignore those same distinctions.

In Segura, this Court took as given that

primary evidence found in plain view when agents unlawfully entered an apartment was discovered unlawfully and thus was inadmissible. Here, the marijuana was similarly found in plain view when agents unlawfully entered the warehouse. Thus the marijuana, too, is inadmissible.

In Segura, this Court held that other evidence, first identified only later in a warranted search, could be admitted -- but only because its discovery was not related to the initial, unlawful intrusion. Here, the discovery of the marijuana plainly was related to the agents' original unlawful search.[6]

6. In our view, the Segura case was wrongly decided. While, as indicated in the text, Segura stands against the admissibility of the marijuana at issue in this case and thus need not be reexamined in order to decide this case properly, we nevertheless urge the Court to take this opportunity to overrule Segura here and now. See Segura, supra, at 817 (Stevens, J., dissenting).

B. Failure to enforce the exclusionary rule here would encourage federal agents to ignore fourth amendment standards

Under this Court's most recent precedents, the purpose of the exclusionary rule is to deter violations of the fourth amendment. That purpose would plainly be served by excluding the marijuana discovered unlawfully in this case; conversely, the deterrent purpose would be frustrated by a failure to invoke the rule here.

This is not a case in which poorly-trained local police officers misjudged esoteric fourth amendment standards and invaded a criminal defendant's privacy in circumstances that an appellate court later concludes did not justify a search. The DEA and FBI agents responsible for the illegal search in this instance are some of the most seasoned and sophisticated law enforcement officials in the nation. Search and seizure

is the stock and trade of drug investigations, and this Court can take judicial notice that the men and women assigned to this duty are, and ought to be, the officers best positioned to know and understand the fourth amendment standards governing their investigations.[7]

In this instance, moreover, the absolute necessity of a warrant authorizing the search of this warehouse cannot be gainsaid. Time and again, this Court has rejected the contention that a warrantless search can be undertaken so long as a search warrant is obtained quickly thereafter. The enormous importance of prior judicial supervision of searches has been repeated in a long series

7. Mr. Garibotto, who physically broke into the warehouse in this case, was a DEA supervisor. Mr. Keaney, the DEA agent who obtained the warrant, was a thirteen year veteran who had participated in approximately three hundred controlled substance cases. Affidavit, J.A. at 15.

of cases. E.g., Chimel v. California, 395 U.S. 752 (1969). What occurred here was an unambiguous, unadorned refusal on the part of the agents concerned to conform their behavior to the Constitution.

The record discloses that federal agents set aside the familiar rule that a search warrant is ordinarily required before the search of a building. They barged in without judicial oversight. They attended to the law only later, when they discovered something that could be used against Mr. Murray and wished by some means to forestall application of the exclusionary rule. The only practical way to establish incentives to think about the fourth amendment before, and not after, a search is to meet the kind of behavior exhibited in this case with firm resolve. The marijuana must be excluded.

This, of course, is precisely the point of Segura, supra, in which Chief Justice

Burger pointed out that unlawful searches will be discouraged by the exclusion of any evidence they produce -- including evidence in plain view. 468 U.S. at 812.[8]

II. THERE IS NO BASIS FOR HOLDING THAT, BUT FOR THE UNLAWFUL DISCOVERY OF THE MARIJUANA, IT WOULD INEVITABLY HAVE BEEN OBTAINED BY INDEPENDENT LAWFUL MEANS

The First Circuit mentioned in passing that it was fortified in its judgment by the so-called inevitable discovery doctrine

8. It may be said that the Court in Segura had no occasion to decide whether evidence initially observed during an unlawful search had to be excluded, even as other evidence (obtained in a later, independent search) was admitted. Yet to the extent Chief Justice Burger's opinion for the Court pointed out that unlawful intrusions would be discouraged by the exclusion of primary evidence discovered in plain view, it is fair to understand Segura to indicate that, in a case such as the one at bar, the marijuana is inadmissible.

embraced by this Court in Nix v. Williams, 467 U.S. 431 (1984). When applicable, that doctrine holds that evidence actually seized in an unlawful manner may nonetheless be admissible if, but for its unlawful discovery, it would inevitably have been found and obtained by other, lawful means underway at the time of the unlawful search. The inevitable discovery doctrine cannot justify the use of the marijuana at trial in this case for a number of reasons.

A. Any attempt in this case to invoke the inevitable discovery doctrine must posit that the marijuana was actually obtained unlawfully -- and not by way of an independent source

It should be clear at the outset that any argument in this case grounded in the inevitable discovery doctrine is mutually exclusive of the claim that the second search of the warehouse constituted an independent, lawful source of the marijuana. The

inevitable discovery doctrine posits that the evidence in question was obtained unlawfully and, thereafter, asks whether it might have been obtained anyway by some other, lawful means. Nix, supra, at 443.

If, in this case, for example, the government were to concede that the second search was tainted by the first and thus unlawful, the government arguably[9] could attempt to establish that some third (and lawful) search, preparations for which were underway at the time of the unlawful searches, would inevitably have turned up the marijuana in due course. The government made no such argument below, of course, and we are aware of no support for any such claim. The inevitable discovery doctrine as it was described in Nix is, accordingly, unavailable

9. For purposes of this section, we lay aside arguments made in Section III below.

here.

B. If the second search is considered to be evidence that the marijuana, initially discovered unlawfully, would have been obtained anyway in a lawful search, the prosecution failed to establish by a preponderance of the evidence that the marijuana would inevitably have been obtained through lawful means underway at the time of its unlawful discovery

It appears that the First Circuit and the government believe that the inevitable discovery doctrine can be asserted in this case in a different way. The argument, as we understand it, backs up the events in the episode described in the record to the point at which the marijuana was discovered unlawfully in the first search. Then, positing that unlawful discovery, it is argued that the later, warranted search provides evidence that the marijuana would inevitably have been obtained lawfully if the agents had never entered the warehouse in the afternoon and, instead, had waited until the

magistrate had authorized a search in the evening.

Any such analysis is deeply flawed. First, it is critical to distinguish this case, in which it is argued that the same agents who committed the initial constitutional violation would inevitably have discovered the evidence by lawful means, from a case like Nix, in which it was argued that other law enforcement officers, acting independently of the wrongdoer, would have located the evidence in a lawful manner.

In Nix, it will be recalled, there were two investigations: Detective Leaming's (unconstitutional) interrogation of the defendant and Agent Ruxlow's (constitutional) search of the countryside between Des Moines and Davenport. This Court was satisfied that Ruxlow's searchers would inevitably have come upon the victim's body without assistance from Detective Leaming. But no one contended

that Leaming would inevitably have located the body by lawful means but for his unlawful behavior.[10]

Second, even crediting the argument that the inevitable discovery doctrine can be asserted with respect to the agents in this case, the government has failed to demonstrate, by a preponderance of the evidence, that these same agents would inevitably have conducted a lawful search for the marijuana if they had not first run roughshod over Mr. Murray's fourth amendment

10. The record in Nix showed that Leaming had overheard the defendant's Davenport attorney explain to the defendant that the location of the body would be disclosed to the police after consultation with defense counsel in Des Moines. Brewer v. Williams, 430 U.S. 387, 408 (1977)(Marshall, J., concurring). Yet no one contended that the likelihood, however real, that Leaming himself would have learned what he wanted to know lawfully if he had only been more patient was at all significant in determining whether the inevitable discovery doctrine permitted the state to use the body in evidence.

rights.

The mere fact that the agents obtained a warrant in this case proves at most that they knew enough about the fourth amendment to understand that they had to do something after the fact if they were to have any chance of preserving the fruits of their unlawful behavior for trial.

Indeed, the most likely explanation of this entire episode is that the agents first conducted a warrantless search they knew to be unconstitutional in order to decide whether it was worth the bother to get a warrant for what would at least look like a valid search later. There is very simply nothing in the record to persuade the Court that, if these busy agents had not first verified that they would find something on their return, they would inevitably have obtained a warrant to search the warehouse lawfully.

Nor has the government established by a preponderance of the evidence that these agents were engaged in the process of obtaining a search warrant at the time they discovered the marijuana unlawfully. The record flatly refutes any such claim. Two agents were dispatched for a warrant after the warehouse had been searched and secured.[11]

There is, of course, a reason why the inevitable discovery doctrine demands a demonstration that the means by which evidence would have been discovered must have been set in motion at the time of an unlawful discovery. In that way, the Court can be more confident that an existing investigation would have continued if it had not been short-circuited. When, however, an

11. Mr. Cleary testified that he could recall no discussion of a warrant until after Garibotto had broken into the warehouse. J.A. at 52.

inevitable discovery claim rests entirely on allegations that some lawful investigative device would have been deployed later, the enterprise degenerates into sheer speculation. See Nix, supra, at 457 (Stevens, J., concurring).

In all candor, nobody knows how these agents would have spent their evening if they had not unlawfully discovered marijuana in this warehouse and thus had not known that an evening search would bear fruit. Certainly the government has not established that the agents would have obtained a warrant and conducted a search without that prior knowledge.

III. THE INEVITABLE DISCOVERY DOCTRINE SHOULD NOT BE EXTENDED TO THIS CASE

This Court has recognized the inevitable discovery doctrine in only one instance, Nix,

and therefore has not yet had the opportunity to explore the doctrine's potential implications or, certainly, to identify the circumstances in which the doctrine can reasonably be invoked. As we have explained, this case is not a suitable vehicle for further work on the problem. Indeed, we find the suggestion that the inevitable discovery doctrine is available here to depend upon a skewed understanding of the role played by the second search. If, however, the Court wishes to discuss the doctrine, the Court should establish two very clear rules for this and future cases.

A. The inevitable discovery doctrine should not be applied to fourth amendment cases

The suggestion that the inevitable discovery doctrine should be available in fourth amendment cases is fraught with risk. The danger is that in an attempt to fine tune the exclusionary rule so as to pay as small a

price (measured by the exclusion of reliable evidence) as possible for genuine deterrent effect, the Court will strike the wrong balance and, in the end, undercut the incentive structure on which the system depends for the enforcement of substantive fourth amendment rights. Small wonder, then, that this Court has not yet entertained any such inevitable discovery claim in this context. Cf. Hayes v. Florida, 105 S.Ct. 1643, 1646 n.1 (1985)(putting the issue aside).

The invocation of the inevitable discovery doctrine in Nix raised no similar question regarding the incentives felt by law enforcement officers. The underlying constitutional standard enforced there -- the prohibition on the deliberate elicitation of incriminating statements in violation of the right to counsel -- was fully secured by the exclusion of the defendant's response to the

Christian Burial Speech. Once the Court had deprived the prosecution of the use of a statement police officers were barred from obtaining, it was unnecessary also to exclude the body as a further penalty.

In fourth amendment cases, by contrast, the very purpose of the exclusionary rule is to deter law enforcement officers from engaging in unreasonable search and seizure. And when any evidence is admitted notwithstanding a violation of the fourth amendment, the deterrent impact of the exclusionary rule is by that measure diminished.

This is true for any exception to the fourth amendment exclusionary rule; it would be particularly true of the inevitable discovery doctrine if it were to be borrowed from Nix and applied in fourth amendment cases. For, again, the inevitable discovery doctrine posits that evidence was produced in

violation of the fourth amendment and nevertheless permits the use of that evidence in the circumstances we have discussed. It is one thing to maintain something like the independent source rule, which allows the government to establish that evidence was not obtained unlawfully; it is quite another thing to invoke the inevitable discovery doctrine in this context and thus to admit evidence that was obtained unlawfully.

The invocation of such a doctrine would only encourage what, we are afraid, occurred in this very instance. Law enforcement officers who know or should know that they are violating the fourth amendment may go ahead without heeding their constitutional responsibilities and then leave it to imaginative prosecutors and judges to speculate about the ways in which evidence could have been discovered by proper means.

B. If applied to fourth amendment cases, the inevitable discovery doctrine should be available only with respect to derivative, as opposed to primary, evidence

If the inevitable discovery doctrine is to be available at all in fourth amendment cases, it should be limited to derivative evidence. In Nix, the Court explicitly referred to the doctrine as a "derivative evidence analysis," 467 U.S. at 443. That is at most what the doctrine should be if the deterrent impact of excluding the fruits of illegal searches is to be preserved.

Again, the instant case supplies a good illustration. The marijuana in question was discovered as the direct and immediate product of the agents' unlawful invasion of Mr. Murray's privacy. If the agents had pressed on to other evidence, and had arrived at that further evidence by exploiting their discovery of the marijuana, we might have a different case. In that instance, evidence

derived through some chain of events tracing back to the unlawful warehouse search might arguably be admitted, on an inevitable discovery doctrine analysis, without doing critical damage to the deterrent purpose of the exclusionary rule. Primary fruits, like this marijuana, however, must be suppressed.

CONCLUSION

Drug trafficking poses national problems of serious concern to all Americans. In their efforts to do their job, federal law enforcement officers may be tempted to turn round corners on the fourth amendment. Yet the salutary goals which motivate the DEA and the FBI cannot be allowed to obscure fundamental constitutional safeguards their zealous behavior may threaten. Indeed, it is in times of intense pressure upon government officers to show results that we must be most vigilant in defense of individual liberty.

The DEA went too far in this case. These agents bypassed the well-settled constitutional requirement that they have judicial approval before conducting a search and now hope to preserve the immediate fruits of their unlawful behavior because a magistrate concluded, after the search, that

the agents had probable cause. That is not the law. The First Circuit judgment should be reversed and the case remanded so that Michael Murray can be given a trial from which this tainted evidence is excluded.

Respectfully submitted,

Larry W. Yackle
(Counsel of Record)
Boston University
School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-2826

John A. Powell
David B. Goldstein
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

John Reinstein
Civil Liberties Union
of Massachusetts
47 Winter Street
Boston, MA 02108
(617) 482-3170